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Report of the Human Rights Committee

Volume II

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Official Records • Fifty-second Session
Supplement No. 40 (A/52/40)

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NOTE

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The present document contains annexes VI and VII of the report of the Human Rights Committee. Chapters I to VIII and annexes I to V and VIII are contained in volume I.

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A. Communication No. 481/1991; Jorge Villacnés Ortega v. Ecuador (Views adopted on 8 April 1997, fifty-ninth session)[*]

Submitted by:	Jorge Villacrés Ortega [represented by Ha. E. Monge]
Victim:	The author
State party:	Ecuador
Date of communication:	4 November 1991 (initial submission)
Date of decision on admissibility:	16 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1997,

Having concluded its consideration of Communication No. 481/1991 submitted to the Human Rights Committee on behalf of Mr. Jorge Villacrés Ortega under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[**]

1. The author of the communication is Jorge Villacrés Ortega, an Ecuadorian citizen, residing in Quito, Ecuador. At the time of submission of the communication he was imprisoned at the Cárcel de Varones at Quito. He claims to be a victim of violations by Ecuador of articles 2, 7, 9 and 14 of the International Covenant on Civil and Political Rights. He is represented by the Comisión Ecuménica de Derechos Humanos (CEDHU), a non-governmental organization in Quito, Ecuador.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Ms. Laure Moghaizel, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[**] Pursuant to rule 85 of the rules of procedure, Committee member Julio Prado Vallejo did not participate in the examination of the present communication.

Facts as submitted by the author

2.1 The author is a carpenter by profession. He was detained on 19 October 1989 by police officers, who found less than one gram of cocaine in his pockets, and arrested him on suspicion of trafficking in cocaine. He was tried by the Tribunal Cuarto de Pichincha, found guilty as charged and sentenced, on 3 June 1991, to eight years' imprisonment. He appealed to the Supreme Court of Justice, which quashed the conviction and ordered him sent to a rehabilitation programme for drug addicts.

2.2 With regard to his arrest, the author states that he was taken to Interpol by agents of the SIC-P (security police) and that a representative of CEDHU visited him at the police station and saw the traces of beatings on his back, arm and stomach.

2.3 He admitted to possession of cocaine, which he claimed to have bought for his own consumption. The forensic tests carried out proved that he was an addict. Although the report from the office of the public prosecutor recommended that he be sent to a hospital for disintoxication treatment, this was ignored by the sentencing judge.

2.4 Counsel states that the author was tortured by prison personnel following an escape attempt by the author's cellmates, on 1 June 1990. The medical report stated that "... he had a reddish inflammation on both eyelids due to the introduction of aji (peppers) and gas; tear and prickly conjunctivitis; multiple round black traces on his abdomen and thorax resulting from the application of electric discharges, bruises on his thigh and skin stripped off his leg ...".[1]

2.5 With respect to the exhaustion of domestic remedies, the author, while in prison, filed a recurso de amparo. There is no further information concerning the status of that recourse.

Complaint

3.1 The author claims to be a victim of a violation of article 7 because he was subjected to torture and ill-treatment following his arrest. This was attested to by a member of CEDHU.

3.2 Although the author does not specifically invoke article 10 of the Covenant, the facts before the Committee concerning alleged ill-treatment while the author was imprisoned appear to raise issues under that article.

3.3 The author also claims to be a victim of a violation of article 9 because he was subjected to arbitrary arrest and detention although he was not a drug trafficker but only a consumer.

3.4 It is further submitted by the author that his trial was unfair, in violation of article 14 of the Covenant. In this respect, he contends that he was convicted despite the reports submitted by the public prosecutor's office recommending that he undergo drug rehabilitation treatment, in accordance with Ecuadorian law.

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[1] On 12 October 1996, counsel submitted a medical report, dated 9 June 1990, which had been taken down before the judge of the First Criminal Court of Pichincha (Juez Primero de lo Penal de Pichincha).

Committee's decision on admissibility

4. On 26 August 1992, the communication was transmitted to the State party, which was requested to submit to the Committee information and observations in respect of the question of admissibility of the communication. Despite two reminders, sent on 10 May 1993 and 9 December 1994, no submission had been received from the State party prior to the Committee's admissibility decision.

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee ascertained, as required under article 5, subparagraph 2 (a), of the Optional Protocol, that the same matter had not been examined under another procedure of international investigation or settlement.

5.3 The Committee noted with concern the absence of cooperation from the State party, despite two reminders addressed to it. On the basis of the information before it, the Committee found that it was not precluded from considering the communication under article 5, subparagraph 2 (b), of the Optional Protocol.

5.4 With respect to the author's complaint that he had been subjected to torture and ill-treatment in violation of articles 7 and 10 of the Covenant, as attested to by a member of CEDHU, the Committee found that the facts as submitted by the author were substantiated, for purposes of admissibility.

5.5 The Committee found that, for purposes of admissibility, the arrest of the author on possession of cocaine was not arbitrary. Nor had the author submitted sufficient evidence to substantiate, for purposes of admissibility, a claim of a violation of article 14 of the Covenant.

6. On 16 March 1995, the Human Rights Committee decided that the communication was admissible. The author should be requested to provide medical reports in respect of the allegations of ill-treatment he had suffered.

Observations by the State party about the merits of the case and comments thereon by the author

7.1 In two submissions on the merits of the communication, dated 18 October 1995 and 23 May 1996, the State party states that Jorge Oswaldo Villacrés Ortega has been arrested 22 times on a variety of offences, including the 1989 detention for possession of cocaine.

7.2 With regard to the allegations of torture and ill-treatment made by the author (see paragraphs 2.2 and 2.4 above), the State party forwards the results of a police investigation, dated 1 April 1996 and signed by two police officials of the Pichincha district, indicating that no medical report or other evidence of torture or ill-treatment of Mr. Villacrés has been found. Reference is made to allegations by the defence counsel of Mr. Villacrés to the effect that a medical report did exist. The police inspectors allegedly were unable to obtain a copy of the report from the CEDHU office at Quito.

8.1 By a submission of 31 May 1996, CEDHU confirms that Mr. Villacrés was detained on 19 October 1989 and released on 17 January 1992. With respect to the alleged ill-treatment during detention, CEDHU states that it does not have the medical report requested by the Committee in subparagraph 6 (c) of the admissibility decision. CEDHU contends that the report is probably filed with the record of the Villacrés case before the Ecuadorian Supreme Court.

8.2 On 12 October 1996, CEDHU submitted a copy of the medical report, dated 9 June 1990 and certified before a magistrate (Juez Primero de lo Penal de Procuraduría), stating that the injuries suffered were consistent with those produced by irritating substances and by the application of electrodes.

Examination on the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's allegations of ill-treatment (see paragraphs 2.2 and 2.4 above), two issues arise: in respect of the first, i.e., the ill-treatment the author suffered at the hands of the police following his arrest, the Committee considers that this claim has not been substantiated. As to the second issue, i.e., the ill-treatment the author suffered after an escape attempt by his cellmates, the Committee has noted the State party's claim that it was unable to trace the author's medical reports, although the copy in the case file reveals that this report was certified in the presence of a magistrate. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated by the medical reports submitted by counsel, in particular that of 9 June 1990, where it is confirmed that the author showed signs of ill-treatment. In the Committee's view, the treatment suffered by the author after the escape attempt of his cellmates amounts to cruel and inhuman treatment, in violation of article 7 and article 10, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 7 and article 10, paragraph 1, of the Covenant.

11. Pursuant to article 2, subparagraph 3 (a), of the Covenant, the author is entitled to an effective remedy, entailing compensation for the ill-treatment suffered. The Committee reaffirms the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person. The State party is under an obligation to ensure that similar events do not occur in the future.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation is established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

B. Communication No. 526/1993; Michael and Brian Hill v. Spain (Views adopted on 2 April 1997, fifty-ninth session)[*]

Submitted by:	Michael and Brian Hill
Victims:	The authors
State party:	Spain
Date of communication:	1 October 1992 (initial submission)
Date of decision on admissibility:	22 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 April 1997,

Having concluded its consideration of Communication No. 526/1993 submitted to the Human Rights Committee by Messrs. Michael and Brian Hill under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[**]

1. The authors of the communication are Michael Hill, born in 1952, and Brian Hill, born in 1963, both British citizens, residing in Herefordshire, United Kingdom of Great Britain and Northern Ireland. They claim to be victims of violations by Spain of articles 9 and 10 and article 14, paragraphs 1, 2 and subparagraphs 3 (b) and (e), of the International Covenant on Civil and Political Rights. Michael Hill also invokes article 14, subparagraph 3 (d), of the Covenant. The Covenant entered into force for Spain on 27 August 1977, and the Optional Protocol on 25 April 1985.

Facts as submitted by the authors

2.1 The authors owned a construction firm in Cheltenham, United Kingdom, which declared bankruptcy during the detention of the authors in Spain. In July 1985, they went on holiday to Spain. The Gandía police arrested them on 16 July 1985, on suspicion of having firebombed a bar in Gandía, an accusation which the authors have denied since the time of their arrest, claiming that they were in the bar until 2.30 a.m. but did not return at 4 a.m. to set fire to the premises.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Ms. Laure Moghaizel, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin and Mr. Maxwell Yalden.

[**] The text of two individual opinions by Committee members Nisuke Ando and Eckart Klein is appended to the present document.

2.2 At the police station, the authors requested the police to allow them to contact the British Consulate, so as to obtain the aid of a consular representative who could assist as an independent interpreter. The request was denied, and a young, unqualified student interpreter was called to assist in the interrogation, which took place without the presence of defence counsel. The authors state that they could not express themselves properly, as they did not speak Spanish, and the interpreter's English was very poor. As a result, serious misunderstandings allegedly arose. They deny having been informed of their rights at the time of their arrest or during the interrogation and allege that they were not properly informed of the reasons for their detention until seven and eight hours, respectively, after the arrest.

2.3 The authors further state that they were confronted with an alleged eyewitness to the crime during a so-called identification parade made up of the authors, in handcuffs, and two uniformed policemen. The witness, who initially could not describe the authors of the crime, eventually pointed them out.

2.4 They also complain that their new camper, valued at 2.5 million pesetas, as well as all their money and other personal effects, were confiscated and not returned by the police.

2.5 On 19 July 1985, the authors were formally charged with arson and causing damage to private property. The indictment stated that the authors, on 16 July 1985, had left the bar at 3 a.m., driven away in their camper, returned at 4 a.m. and thrown a bottle containing petrol and petrol-soaked paper through a window of the bar.

2.6 On 20 July 1985, they appeared before the examining magistrate (Gandía No. 1) in order to submit a statement denying their involvement in the crime.

2.7 After having been held in police custody for 10 days, for five of which they were allegedly left without food and with only warm water to drink, they were transferred to a prison in Valencia.

2.8 On 29 July 1985, a lawyer was assigned to them for the preliminary hearing; this lawyer allegedly told the authors that, if they could pay a certain amount of money, they would be released. It is not clear from the authors' submissions how the preliminary hearing proceeded. It would appear, however, that they claim that confusion and misunderstandings were common, due to the incompetence of the interpreter. In this context, it is submitted that the police records stated that their camper operated on "petróleo" (diesel). When asked by the examining magistrate (who was also under the impression that the camper ran on diesel) what substance their spare container contained, they replied to him that it was filled with petrol, which was translated as "petróleo" by the interpreter. The judge then said that they were lying. The authors attempted to explain that their camper ran on petrol and that in the back of the vehicle they had a spare four-litre container filled with petrol. According to them, the judge must have seen or smelled from a sample that the container was indeed filled with "gasolina" (petrol), and since he believed that the camper ran on diesel, he must have thought that there was a container with petrol for manufacturing the Molotov cocktail.

2.9 Upon conclusion of the preliminary hearing, the authors were informed that the trial would take place in November 1985. However, the trial was delayed, reportedly on the ground that some documents could not be found. On 26 November 1985, the authors were summoned to court to sign some papers, whereupon the judge told them that he would contact their lawyer in order to set a new date for the trial. On 10 December 1985, the authors informed the legal aid lawyer that his services were no longer required, as they were not satisfied with his conduct of the case.

2.10 The authors secured private legal representation on 4 December 1985. On 17 January 1986, the lawyer submitted an application to the court for the authors' release on bail, mainly on the ground that their construction firm was in a state of bankruptcy owing to their detention. Upon the advice of the public prosecutor, bail was denied on 21 February 1986. The authors complained that, although they had paid large sums of money to the lawyer, no progress was being made in their case, as he was ignoring their instructions. On 31 July 1986, they dismissed the lawyer. As the authors did not hear from him again, they assumed that the lawyer had notified the relevant authorities of their decision and that a legal aid lawyer would be assigned to them. However, it was not until 22 October 1986 that the lawyer notified the court of his withdrawal from the case.

2.11 On 1 November 1986, a new legal aid lawyer was assigned to the authors. The trial was scheduled to start on 3 November 1986. The first question from the public prosecutor was what fuel their camper used. The authors again replied that it ran on petrol, which this time was translated as "gasolina". After having given the same reply three times, the authors requested an adjournment of the trial, so that the prosecution could verify their claim. They also asked for an adjournment on the ground that they had had only a 20-minute interview with their defence lawyer since he had been assigned to their case. The trial was postponed for two weeks.

3.1 The authors complain that the legal aid lawyer did not make much effort to prepare their defence. They state that, when he visited them on 1 November 1986, he was accompanied by an interpreter who spoke barely any English; the lawyer did not even have the case file with him. After the trial was adjourned, the lawyer only visited them on 14 November 1986, for 40 minutes, again without the case file, and this time without the interpreter. The authors further claim that, although the lawyer was assigned and paid by the State party, he demanded 500,000 pesetas from their father for alleged expenses prior to the hearing.

3.2 With the assistance of two bilingual inmates, the authors prepared their own defence. They decided that Michael would defend himself in court and that Brian would leave it to the lawyer, to whom they provided all the relevant material.

3.3 On 17 November 1986, the authors were tried in the Provincial High Court of Valencia. Through the interpreter, Michael Hill informed the judge of his intention to defend himself in person, pursuant to article 6, subparagraph 3 (c), of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The judge asked him whether he spoke Spanish and whether he was a lawyer; when he replied in the negative, the judge told him to sit down and be quiet.

3.4 The prosecution's case was based solely on an alleged eyewitness, who had testified during the preliminary investigations that he had met with the authors prior to the incident and that their camper was parked in front of his house. At about 4 a.m., he had seen two youths resembling the authors throw a flaming bottle into the bar and leave in a grey camper. He had immediately called the police. The authors submit that the statements made by the witness during the preliminary investigations are contradictory in a number of respects and that, during the trial, the witness could not identify them. He was asked three times by the judge to take a look at the accused and each time the witness said that "he could not remember the youths", that "he was an old man" and that "it had happened 16 months ago". Furthermore, under cross-examination, he failed to give a clear description of the camper and stated that "the vehicle used by the perpetrators could have been British, Austrian or even Japanese".

3.5 The authors explain that, as the lawyer only asked the witness four irrelevant questions about the camper and did not take up the list of questions which they had prepared specially about the irregularities in the so-called identification parade, Michael Hill again requested the right to defend himself in person. He informed the judge that he wanted to cross-examine the prosecution witness and call a witness for the defence who was present in court. The judge allegedly replied that he would have the opportunity to do all those things on appeal, demonstrating clearly that at that point he had already decided to convict them in violation of their right to be presumed innocent. After a trial lasting barely 40 minutes, the authors were convicted as charged and sentenced to six years and one day of imprisonment and to the payment of 1,935,000 pesetas in damages to the owner of the bar.

3.6 The authors then wrote numerous letters to various offices, such as the British Embassy in Madrid, the Ministry of Justice, the Supreme Court, the King of Spain and the Ombudsman, and to their lawyer, complaining of an unfair trial and requesting information on how to proceed further. The lawyer replied that his legal aid services terminated upon the conclusion of the trial and that if they required further assistance from him they would have to pay. The Ministry of Justice referred the authors to the court of first instance. By letter of 15 January 1987, they requested the High Court of Valencia for a retrial on the ground that their trial had been unconstitutional and in violation of the European Convention. In October 1987, they submitted for the sixth time a petition to the High Court of Valencia, complaining of unfair trial and this time requesting it to assign legal counsel to them. By note of 9 December 1987, the Court replied that their complaint was groundless and that it could not deal with the matter.

3.7 In the meantime, and on 29 January 1987, they submitted notification of their intention to appeal. Subsequently they appointed a private lawyer to represent them. On 24 March 1987 the Supreme Court rejected the appointment of the private lawyer because he was not registered in Madrid. On 24 July 1987 the authors forwarded their grounds of appeal to the Supreme Court. Since the authors were not allowed to defend themselves in person, the Court appointed a legal aid lawyer on 17 December 1987. On 28 March 1988, the lawyer submitted to the Court that he did not find grounds for appeal, after which the Court appointed a second legal aid lawyer, on 12 April 1988, who also stated that he found no grounds for appeal. On 6 June 1988, the Supreme Court, in conformity with article 876 of the Code of Criminal Procedure of Spain, did not hear the appeal, giving the authors 15 days to find a private lawyer. The authors then wrote to the Bar Association (Colegio de Abogados), in September 1987, requesting it to assign a lawyer and a solicitor for their appeal; no reply was received, however.

3.8 In March 1988, the Ministry of Justice informed the authors that they could initiate an action for amparo before the Constitutional Court, since the rights which they claimed had been violated were protected by the Spanish Constitution.

3.9 On 6 July 1988, the authors (formally) petitioned the court of first instance for their release, pursuant to article 504 of the Code of Criminal Procedure, which provides that a prisoner may be released pending the outcome of his or her appeal when he or she has served one half of the sentence imposed. On 14 July 1988, the authors were released and returned to the United Kingdom, having informed the Spanish authorities of their address in the United Kingdom and of their intention to pursue the case.

3.10 The authors appealed (remedy of amparo) to the Constitutional Court on 17 August 1988. Upon their return to the United Kingdom, the authors made several attempts to contact the lawyer and solicitor in Spain, in order to obtain information on the status of their appeal and the court documents, to no avail. Finally, in April or May 1990, they were informed through the British Embassy in Madrid that the Constitutional Court had decided not to allow the appeal to proceed. With this, it is submitted, all available domestic remedies were exhausted.

Complaint

4.1 The authors, who proclaim their innocence, express their indignation at the judicial and bureaucratic system in Spain. According to them, it was likely that they were the victims of a swindle by the bar owner, who could have had a motive for setting the fire. They protest that the identification parade was not conducted in accordance with the law. They complain that the judge did not intervene when it became clear that the legal aid lawyer was not defending them properly. Moreover, by refusing to allow Michael Hill to conduct his own defence and to call a witness on their behalf, the judge violated the principle of equality of the parties. It is submitted that the use by the police investigating unit and the judge of Michael Hill's prior criminal record was unjust and prejudicial not only to Michael but also to Brian Hill.

4.2 As to article 14, paragraph 2, the authors claim that this principle was violated before, during and after the trial: before the trial, because of the judicial authorities' repeated refusal to grant bail; during the trial, when the judge told Michael Hill that he would have the opportunity on appeal to defend himself and to call a witness for the defence; and immediately after the trial, before the verdict had been pronounced, when the legal aid lawyer started to negotiate with their father about the handling of the appeal.

4.3 The authors claim that the lack of cooperation by the Spanish authorities, as a result of which they themselves had to translate every single document with the help of other, bilingual prisoners, the lack of information in prison on Spanish legislation and the lack of competent interpreters during the interrogation by the police and during the preliminary hearing, together with the inadequate conduct of the defence by the State-appointed lawyer, amount to a violation of article 14, subparagraph 3 (b), of the Covenant.

4.4 Article 14, subparagraph 3 (d), is said to have been violated in Michael Hill's case because, during the trial, he was twice denied the right to defend himself in person. As a consequence, article 14, subparagraph 3 (e), was also violated, as he was also denied the opportunity to examine, on the brother's behalf, a witness who was waiting outside the courtroom.

State party's information and observations

5.1 In its statement of 11 April 1993, the State party argues that the authors abused the right of submission and that the communication should be declared inadmissible in accordance with article 3 of the Optional Protocol. From the information provided by the State party, including the texts of judgments and other documents, it appears that the latter raises no objection with respect to the exhaustion of domestic remedies.

5.2 The State party summarizes the situation in this case as follows:

Concerning the detention:

> "1. On 16 July 1985, at around 4 a.m., two individuals, in a metallic grey camper with horizontal trim on the sides and rear and with a registration beginning with the letter A, arrived at the JM club, located in Grao de Gandía, and, after preparing a Molotov cocktail, threw it into the club, breaking several panes of glass above the door, then immediately fled the scene, having thereby started a fire in the premises.
>
> "2. An eyewitness to the incident called the police.
>
> "3. The police arrived at the scene, together with the fire brigade, and, after listening to the eyewitness, located the camper, registration A811 JAB, inside which they discovered a partly-empty plastic container with some four litres of petrol, and arrested the occupants of the camper, Messrs. Brian and Michael Hill.
>
> "4. In the presence of an interpreter, the detainees were immediately informed of their rights.
>
> "5. In the presence of the interpreter and with the assistance, at their request, of the legal aid lawyer on duty, the detainees made a statement to the police. They said that they had been in the club in the early hours of the day on which they were making their statement and had drunk 5 or 6 beers there before leaving at around 2.30 a.m. They admitted that the camper and the petrol container belonged to them, but denied having started the fire, acknowledging that 'they had in fact passed close by (the club) in the vehicle' after leaving the premises.
>
> "6. During the identification parade, the police showed several persons to the eyewitness, and the said eyewitness recognized Messrs. Brian and Michael Hill as 'the persons who had set fire to the JM club the previous night by throwing a flaming bottle against its door, and who had fled in a large camper with a foreign registration'."

5.3 Concerning the appearance before the examining magistrate:

> "1. On 17 July 1985, the day after the incident occurred, the Hill brothers testified before the examining magistrate at Gandía, assisted by the legal aid lawyer on duty, reiterating the statement they had made to the police the day before.
>
> "2. Magistrate No. 1 ordered that various proceedings be conducted including an appraisal of the damage caused, which amounted to 1,935,000 pesetas. The other parties who had appeared before the police, including the eyewitness, reiterated their statements.
>
> "3. On 19 July, Magistrate No. 1 of Gandía issued an order to institute criminal proceedings against the Hill brothers for the crime of arson, ordering them to be imprisoned and bail to be set.

"4. Further statements by the accused, an additional police file containing photographs and information provided by Interpol on the record of Michael John Hill, convicted in the United Kingdom for theft, breaking and entry, fraud, possession of stolen goods, forgery, traffic violations and arson.

"5. Impoundment of the camper in connection with the civil liability imposed during the pre-trial proceedings.

"6. Order terminating the pre-trial proceedings, issued by the court on 24 October 1985, and referral of the accused to the Provincial High Court of Valencia. Summons of the accused, who appointed a lawyer of their own choosing to conduct their defence.

"7. On 4 December 1985, the accused sent a statement to a subdivision of the Provincial High Court of Valencia, appointing Mr. Gunther Rudiger Jorda as their lawyer."

5.4 Concerning the oral proceedings:

"1. The defence lawyer chosen freely by the accused called only one witness, the same witness as had been produced by the Public Prosecutor's Office, Mr. P., the eyewitness to the alleged crime.

"2. On 22 October 1986, it was announced that the oral proceedings would take place on 3 November and the parties were duly notified.

"3. On 28 October 1986, a representative of the defence lawyer communicated to the Chamber of the High Court hearing the case that, 'as differences had arisen between the accused and the defence lawyer, he was withdrawing from the case'.

"4. Court order for the accused to appoint a lawyer. The Hill brothers indicated that they wished to be assigned a legal aid lawyer.

"5. Having been assigned a legal aid lawyer, they were informed on 31 October 1986 that the date of the trial would be 3 November 1986. Legal record of the trial on that day, in which the Chamber hearing the case, in view of the lack of time given to prepare the defence, agreed to adjourn the trial and reschedule it for 17 November 1986.

"6. On 17 November 1986, oral proceedings took place. They opened with the defence submitting a statement by the accused on what had occurred, which was admitted by the Chamber; the direct opinion of the accused was thus made known. The trial was held, using the services of an interpreter, and the eyewitness was examined by both the prosecution and the defence.

"7. On 20 November 1986, the Provincial High Court of Valencia handed down its judgment, noting that the accused did not have a criminal record, and after examining the facts sentenced the Hill brothers to six years and one day in prison for the crime of arson and imposed civil liability for the damage caused by the fire."

5.5 Concerning the appeal to annul the judgment of the High Court filed by the Hill brothers:

"(a) Only Mr. Brian Anthony Hill appeared at the appeal proceedings. He appointed Mr. Gunther Rudiger Jorda as his lawyer, the same lawyer whom he and his brother had previously appointed and then dismissed five days before the trial;

"(b) The two brothers submitted a statement to the Supreme Court which was included in their case file;

"(c) As Mr. Rudiger Jorda could not represent the brothers in the Supreme Court, he requested that a legal aid lawyer be assigned to Brian Anthony Hill;

"(d) A legal aid lawyer was assigned, but he did not find any grounds whatsoever to justify the appeal;

"(e) A second legal aid lawyer, also appointed in accordance with article 876 of the Code of Criminal Procedure, did not find grounds for appeal either;

"(f) Two lawyers in succession found that there were no legal grounds for appeal. The proceedings were then referred to the Public Prosecutor's Office, to see whether it could find grounds for appeal. The Public Prosecutor's Office did not find grounds for appeal either and referred the case back;

"(g) An order was issued dismissing the appeal as not properly made and granting the appellant the right to appoint a lawyer of his choosing in order to put the appeal into proper legal form;

"(h) After he had failed to do so within the required time period, the case was filed;

"(i) During that time, the accused had violated the conditions of their conditional release by abandoning the address in Spain which they had given and fleeing the country."

5.6 Concerning the conditional release:

> "On 14 July 1988, the Provincial High Court of Valencia, with the appeal to annul the judgment still pending, granted the Hill brothers a conditional release without bail and ordered them to appear on the first and fifteenth day of each month. The accused gave the British Embassy as their address, while they looked for an apartment."

5.7 Concerning the remedy of amparo:

> "On 16 August 1988, the Hill brothers initiated an action for amparo before the Constitutional Court, requesting that a legal aid lawyer be assigned to them. After a lawyer was appointed, the application for amparo was submitted. On 8 May 1989, the Constitutional Court issued a reasoned and substantiated ruling that the action for amparo was inadmissible."

5.8 Regarding civil liability, the State reports that the camper, valued at 2.5 million pesetas, was offered at a public auction but remained unsold. It was then handed over to the owner of the bar as compensation for the damage caused in the fire.

5.9 The State party notes:

> "That the accused were granted a conditional release on 14 July 1988 and, following the judgment of the Supreme Court in which the appeal was dismissed, in violation of the conditions of their provisional release, the Hill brothers left Spain, and that, 'according to the statement by the British Vice-Consul, the brothers, once they got out of prison in July or August last year, left Spain and were not residing with their parents, and were currently believed to be in Portugal'. On 1 March 1989, the Provincial High Court of Valencia therefore declared Michael John and Brian Anthony Hill to be in contempt and ordered that they be sought and taken into custody."

Authors' comments

6.1 In their comments of 6 July 1993, the authors maintain that they are innocent and attribute their conviction to a series of misunderstandings during the trial caused by the lack of proper interpretation.

6.2 The authors reiterate that their rights were violated, in particular the right to a fair trial with guarantees of adequate time and facilities for the preparation of the defence, and the right to defend oneself in person and to examine witnesses. The authors reject the State party's accusation that they fled Spain as soon as they were released, explaining that they fulfilled the conditions of their provisional release and then returned to their family in the United Kingdom, having informed the authorities of their address there and of their intention to pursue the case in order to prove their innocence. The Committee's file shows that the Hill brothers did in fact write to the Constitutional Court in February 1990 to enquire about the outcome of their appeal.

6.3 The authors reject the presumption of guilt arrived at by the State party on the basis of an Interpol report on Michael Hill. Firstly, the report refers to events which took place in the United Kingdom more than 14 years ago and to a previous criminal record which had been expunged and was therefore not admissible in court. The use of the record by the Public Prosecutor's Office was unfair and prejudicial and the authors had no opportunity to refute it at the oral proceedings, which lasted barely 40 minutes. They emphasize that Michael Hill was denied the right to defend himself in person against the presumption of guilt and that, furthermore, his legal aid lawyer failed to follow his instructions. For those reasons, no defence was put forward on the matter of the prejudicial presumption of guilt. Furthermore, the information which the legal aid lawyer failed to refute also had a very harmful effect on Brian Hill, who had no previous criminal record in the United Kingdom.

Committee's decision on admissibility

7.1 Before examining a complaint contained in a communication, the Human Rights Committee decides, pursuant to rule 87 of the its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee ascertained, as required under article 5, subparagraph 2 (a), of the Optional Protocol, that the matter had not been submitted under another procedure of international investigation or settlement. Taking into account all the information submitted by the parties, the Committee concluded that the domestic remedies referred to in article 5, subparagraph 2 (b), of the Optional Protocol had been exhausted.

7.3 The Committee considered the statement by the State party arguing that the Hill brothers had abused the right of submission, but concluded that only an examination of the merits of the case could clarify whether the Hill brothers had abused that right and whether the State party had violated the Covenant.

7.4 The Committee considered that the allegations made under article 14 had been sufficiently substantiated for purposes of admissibility and, accordingly, should be examined on the merits. The facts submitted to the Committee also appeared to raise questions regarding articles 9 and 10 (see paras. 2.3 and 2.7 above).

8. On 22 March 1995, the Human Rights Committee found the communication admissible.

Observations by the State party

9.1 In its statement dated 9 November 1995, the State party refers to its previous observations and to the documents already submitted, and reiterates that the complaint is unfounded. In its submission dated 30 May 1996, the State party contends that the communication should be declared inadmissible on account of abuse of the right of submission. It argues that the authors were placed on provisional liberty on 14 July 1988 on condition that they would appear before the Audiencia Provincial de Valencia on the first of every month. Instead of doing so, the Hill brothers left Spain and returned to England. Because of their breach of the conditions of release and violation of Spanish law, they are estopped from claiming that Spain has violated its commitments under international law.

9.2 As to the merits of the communication, the State party explains that the interpreter was not a person selected ad hoc by the local police, but a person designated by the Instituto Nacional de Empleo (INEM) upon agreement with the Ministry of Interior. Interpreters must have satisfied professional criteria before being employed by INEM. The records indicate that Isabel Pascual was properly designated interpreter for the Hill brothers in Gandía and include a statement from INEM with respect to the assignment of Ms. Pascual and Ms. Rieta.

9.3 As to the authors' desire to communicate with the British Consulate, the State party contends that the documents reveal that the Consulate was duly informed of their detention.

9.4 As to the identification parade, the State party rejects the authors' description of having been brought before the witness in handcuffs and next to uniformed policemen. The State party affirms that the procedural guarantees provided for in articles 368 and 369 of the Code of Criminal Procedure were duly observed. Moreover, the identification parade took place in the presence of the authors' attorney, Salvador Vicente Martínez Ferrer, whom the State party contacted and who, according to the State party's submission, rejects the authors' description of the events. A document sent by the State shows that the two other persons in the identification parade were "inspectores" and formed part of the Superior Police Corps, where no uniform is worn.

9.5 The State party rejects the allegation that the Hill brothers had been kept for 10 days without food and encloses a statement from the chief of the Gandía Police and receipts allegedly signed by the Hill brothers.

9.6 As to the duration of the criminal proceedings up to the oral hearing: from 16 July to 24 October 1985, investigations, including into Michael Hill's prior criminal record, were carried out. On 26 November, the authors were notified and they designated their attorney. On 4 December 1985, the file was referred by the Gandía Court to the Audiencia Provincial de Valencia. On 28 December, the case was referred to the State attorney, who presented his report and conclusions on 3 March 1986. On 10 September, the Court fixed the date for oral hearing on 3 November. On 22 October 1986, defence counsel withdrew. On 28 October, the Hill brothers asked for a legal aid lawyer. On 30 October, Mr. Carbonell Serrano was appointed as legal aid lawyer. On 3 and 17 November, oral hearings took place. The State party concludes that this chronology indicates that there was no undue delay on the part of the Spanish authorities.

9.7 The State party submits that the duration of 16 months of pretrial detention was not unusual. It was justified in view of the complexities of the case; bail was not granted because of the danger that the authors would leave Spanish territory, which they did as soon as release was granted.

9.8 The State party contends that the authors had sufficient time and facilities to prepare their defence. First they had counsel of their own choosing, and when they dismissed him, legal aid counsel was appointed and the hearing postponed to allow the new counsel to familiarize himself with the case. It is not true that Mr. Carbonell, the legal aid attorney, demanded 500,000 pesetas from the authors before trial. He did demand 50,000 pesetas for the case that they would want to appeal to the Supreme Court, an amount that is altogether reasonable for counsel of one's choosing. The authors, however, did not use his services, but availed themselves of the services of two other legal aid lawyers. The State party denies the authors' claim that the documentation was not made available to them in English translation.

9.9 As to the oral hearing, it is stated that Ms. Rieta was a well qualified interpreter and that the authors' only witness, Mr. Pellicer, affirmed having recognized them and their pickup truck.

9.10 As to Michael Hill's right to defend himself, the records do not reveal that Michael Hill had demanded the right to defend himself and that this right was denied by the court. Moreover, Spanish law recognizes, pursuant to the Covenant and the European Convention, the right to defend oneself. Such defence should take place by competent counsel, which is paid by the State when necessary. Spain's reservation to articles 5 and 6 of the European Convention concern only a restriction of this right with respect of members of the Armed Forces.

9.11 As to the presumption of innocence, the authors admit their presence in the club and the number of beers consumed. In view of the evidence given by an eyewitness, there is no basis to claim that they were deemed guilty without evidence.

Authors' comments

10.1 By letters of 8 January and 5 July 1996 the authors contest the State party's arguments on admissibility and merits. As to the alleged abuse of the right of submission, the authors claim that the State party, in view of its manifold violations of their rights in the course of their detention and trial, does not come to the Committee with clean hands. They contend that they acted properly in leaving the territory of Spain, because they feared further violations of their rights. Moreover, they did not immediately leave Spanish territory upon their release from prison on 14 July 1988 but five weeks later, on 17 August, with no objection from the British Consulate at Alicante. They refer to the transcript of their visit to the Consulate on 12 August 1988 in order to obtain a temporary passport. Moreover, the State party had made no provision for them to remain in Spain after release and all the release documentation was in Spanish.

10.2 As to the interpreter, they maintain their contention that Ms. Isabel Pascual made crucial mistakes of interpretation, which ultimately led to their conviction. They have no criticism of the other interpreter, Ms. Rieta, other than the mistake concerning to the fuel used by their truck.

10.3 As to the identification parade, they reaffirm their allegation contained in their submission of 6 July 1993.

10.4 They reaffirm that they did not receive any food or drink for a period of five days and very little thereafter, because the allocation of funds specifically for this purpose were misappropriated. They point out that the State party's list does not refer to the first five days, when they allege to have been totally deprived of subsistence. The lists presented by the State refer to 11 days, and only two of these, 21 and 24 July, show their signature.

10.5 As to the necessary time and facilities to prepare their defence, the authors maintain that they spent but two brief periods with their legal aid attorney, Mr. Carbonell. They maintain their allegation that Mr. Carbonell demanded half a million pesetas from their parents on 1 November 1986.

10.6 Concerning the right of Michael Hill to defend himself, it is said that the letter from the Pro Consul at Alicante, dated 12 March 1987, substantiates their claim that the right under the Spanish Constitution to defend oneself in court was emphatically denied by the judiciary on two occasions. Michael Hill made his desire to defend himself clear well in advance of the Court proceedings via the official interpreter, Ms. Rieta.

10.7 With respect to the length of the hearings, the authors reiterate that the first hearing of 3 November lasted only 20 minutes, in which period the question as to what fuel was used by their vehicle was raised. There was no examination of the defendants or of the witness on this occasion. The second hearing on 17 November lasted 35 minutes, mainly devoted to formalities. Thus, the authors challenge the State party's assertion that the Court could properly examine both defendants and one witness, bearing in mind that every word had to be translated.

10.8 As to the presumption of innocence, they claim that, not only at trial, but throughout the proceedings, they were deemed to be guilty, although from the outset they always affirmed their innocence.

Examination of the merits

11. The Human Rights Committee has examined this communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

12.1 With respect to the State party's allegation that the case should be declared inadmissible on account of abuse of the right of submission, because the authors had breached their conditions of release in violation of the Spanish law, the Committee considers that an author does not forfeit his right to submit a complaint under the Optional Protocol simply by leaving the jurisdiction of the State party against which the complaint is made, in breach of the conditions of his release.

12.2 With regard to the authors' allegations of violations of article 9 of the Covenant, the Committee considers that the authors' arrest was not illegal or arbitrary. Article 9, paragraph 2, of the Covenant requires that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. The authors specifically allege that seven and eight hours, respectively, elapsed before they were informed of the reason for their arrest, and complain that they did not understand the charges because of the lack of a competent interpreter. The documents submitted by the State party show that police formalities were suspended from 6 a.m. until 9 a.m., when the interpreter arrived, so that the accused could be duly informed in the presence of legal counsel. Furthermore, from the documents sent by the State it appears that the interpreter was not an ad hoc interpreter but an official interpreter appointed according to rules that should ensure her competence. In these circumstances, the Committee finds that the facts before it do not reveal a violation of article 9, paragraph 2, of the Covenant.

12.3 As for article 9, paragraph 3, of the Covenant, which stipulates that it shall not be the general rule that persons awaiting trial shall be detained in custody, the authors complain that they were not granted bail and that, because they could not return to the United Kingdom, their construction firm was declared bankrupt. The Committee reaffirms its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial. The State party has indeed argued that there was a well-founded concern that the authors would leave Spanish territory if released on bail. However, it has provided no information on what this concern was based and why it could not be addressed by setting an appropriate sum of bail and other conditions of release. The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant. In these circumstances, the Committee finds that this right in respect of the authors has been violated.

12.4 The authors were arrested on 15 July 1985 and formally charged on 19 July 1985. Their trial did not start until November 1986, and their appeal was not disposed of until July 1988. Only a minor part of this delay can be attributed to the authors' decision to change their lawyers. The State party has argued that the delay was due "to the complexities of the case" but has provided no information showing the nature of the alleged complexities. Having examined all the information available to it, the Committee fails to see in which respect this case could be regarded as complex. The sole witness was the eyewitness who gave evidence at the hearing in July 1985, and there is no indication that any further investigation was required after that hearing was completed. In these circumstances, the Committee finds that the State party violated the authors' right, under article 14, paragraph 3 (c), to be tried without undue delay.

13. With respect to the authors' allegations regarding their treatment during detention, particularly during the first 10 days when they were in police custody (para. 2.7), the Committee notes that the information and documents submitted by the State party do not refute the authors' claim that they were not

given any food during the first five days of police detention. The Committee concludes that such treatment amounts to a violation of article 10 of the Covenant.

14.1 With regard to the right of everyone charged with a criminal offence to have adequate time and facilities for the preparation of his defence, the authors have stated that they had little time with their legal aid lawyer and that when the latter visited them for only 20 minutes two days before the trial, he did not have the case file or any paper for taking notes. The Committee notes that the State party contests this allegation and points out that the authors had counsel of their own choosing. Moreover, in order to allow the legal aid lawyer to prepare the case, the hearing was adjourned. The authors have also alleged that even though they do not speak Spanish, the State party failed to provide them with translations of many documents that would have helped them to better understand the charges against them and to organize their defence. The Committee refers to its prior jurisprudence[2] and recalls that the right to fair trial does not entail that an accused who does not understand the language used in Court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel. Based on the records, the Committee finds that the facts do not reveal a violation of article 14, subparagraph 3 (b), of the Covenant.

14.2 The Committee recalls that Michael Hill insists that he wanted to defend himself, through an interpreter, and that court denied this request. The State party has answered that the records of the hearing do not show such a request, and that Spain recognized the rights of "auto defence" pursuant to the Covenant and the European Convention of Human Rights, but that "such defence should take place by competent counsel, which is paid by the State when necessary", thereby conceding that its legislation does not allow an accused person to defend himself in person, as provided for under the Covenant. The Committee accordingly concludes that Michael Hill's right to defend himself was not respected, contrary to article 14, subparagraph 3 (d), of the Covenant.

14.3 The Committee further observes that in accordance with article 876 of the Spanish Code of Criminal Procedure, the authors' appeal was not effectively considered by the Court of Appeal, since no lawyer was available to submit any grounds of appeal. Consequently, the authors' right to have their conviction and sentence reviewed, as required by the Covenant, was denied to them, contrary to article 14, paragraph 5, of the Covenant.

14.4 Given the Committee's conclusion that the authors' right to a fair trial under article 14 was violated, it need not deal with their specific allegations relating to the adequacy of their representation by a legal aid lawyer, the irregularities of the identification parade, the competence of the interpreters and the violation of the presumption of innocence.

15. The Human Rights Committee, acting in accordance with article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it reveal a violation of articles 9, paragraph 3; 10 and 14, subparagraph 3 (c) and paragraph 5, of the Covenant, in respect of both Michael and Brian Hill and of article 14, subparagraph 3 (d), in respect of Michael Hill only.

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[2] Views in Communication No. 451/1991, Harward v. Norway, adopted on 15 July 1994, paras. 9.4 and 9.5.

16. Pursuant to article 2, subparagraph 3 (a), of the Covenant, the authors are entitled to an effective remedy, entailing compensation.

17. Bearing in mind that by becoming a party to the Optional Protocol, the State has recognized the Committee's competence to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in cases where a violation has been established, the Committee requests the State party to provide, within 90 days, information on the measures taken to give effect to the Committee's Views.

APPENDIX

A. Individual opinion by Committee member Nisuke Ando

[Original: English]

I concur with the Committee's Views with respect to article 14. However, I am unable to concur with the Committee's finding with respect to article 10.

According to the authors, they were held in police custody for 10 days, for five of which they were allegedly left without food and with only warm water to drink (see para. 2.7). The State party rejects this allegation and encloses a statement from the chief of Gandía Police as well as receipts allegedly signed by the authors (see para. 9.5). The authors assert that the allocation of funds specifically for food was misappropriated and that the State party's lists do not refer to the first five days, when they allege to have been totally deprived of subsistence (see para. 10.4).

Nevertheless, as the Committee itself recognizes (see para. 10.4), the lists refer to 11 days from 16 to 26 July 1985 and, contrary to the Committee's finding that the lists show the authors' signatures only for 21 and 24 July, the authors' names with signatures appear on the lists for all 11 days. All the signatures do not seem exactly identical and it may be that the warders in charge of food supply may have signed on the authors' behalf.

In any event, the authors have not presented any evidence to refute the existence and content of the lists: that they were left without food for the first five days of their police detention remains a mere allegation. Under the circumstances, I am unable to concur with the Committee's finding that the State party has not provided sufficient elements to refute the authors' allegation and that it is in violation of article 10 of the Covenant (see para. 13).

B. Individual opinion by Committee member Eckart Klein

[Original: English]

I do not share the opinion expressed in paragraph 14.4 of the Views that the Committee need not deal with the authors' specific allegations relating to the adequacy of their representation by a legal aid lawyer, the irregularities of the identification parade, the competence of the court-appointed interpreters and the violation of the presumption of innocence.

The fact that the Committee found a violation of the authors' right to a fair trial under article 14 regarding certain aspects (article 14, subparagraphs 3 (c) and (d) and paragraph 5, of the Covenant) does not release the Committee from its duty to examine whether other alleged violations of the rights enshrined in article 14 of the Covenant have occurred. According to the authors, violations of article 14, paragraphs 1, 2 and subparagraph 3 (f), should have been considered.

The Committee is not in a position analogous to that of a national court which may and will, for grounds of time constraints, restrict itself to the most evident reasons that by themselves justify the nullification of the measure attacked. The authority of the Committee's Views rests, to a great extent, on a diligent examination of all allegations made by the authors and on a convincing *ratio decidendi*. The influence of the Committee's Views on State party behaviour will be strengthened only if all aspects of the matter have been thoroughly examined and all necessary conclusions have been argued clearly.

Apart from this objection of a general nature, I do not think that article 14 of the Covenant should be seen just as an umbrella provision of the right to a fair trial. It is true that all provisions of the article are connected with the issue, but the express formulation of the different aspects of the right to a fair trial is founded on many varied good reasons, based on historical experience. The Committee should not encourage any view that some rights enshrined in article 14 of the Covenant are less important than others.

I do not think that the facts presented by the authors in this case reveal a violation of Covenant rights beyond the findings of the Committee, but I feel obliged to make clear my own point of view on this matter of principle.

C. Communication No. 528/1993; Michael Steadman v. Jamaica (Views adopted on 2 April 1997, fifty-ninth session)*

Submitted by:	Michael Steadman [represented by Mr. T Hart]
Victim:	The author
State party:	Jamaica
Date of communication:	10 November 1992 (initial submission)
Date of decision on admissibility:	15 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 April 1997,

Having concluded its consideration of Communication No. 528/1993 submitted to the Human Rights Committee on behalf of Mr. Michael Steadman under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Michael Steadman, a Jamaican citizen, at the time of submission awaiting execution at St. Catherine District Prison, Spanish Town. The author claims to be the victim of a violation by Jamaica of articles 6, 9, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by Mr. T. Hart.

Facts as submitted by the author

2.1 On 12 December 1985, the author was convicted of the murder, on 26 June 1983, of one Sylvester Morgan and sentenced to death by the Home Circuit Court of Kingston. His appeal was refused on 19 February 1988 by the Jamaican Court of Appeal. The Judicial Committee of the Privy Council refused special leave to appeal on 21 March 1990. The author's death sentence was commuted in February 1993.

2.2 The prosecution's case against the author was that, on 26 June 1983, he, together with his co-accused Carlton Collins and two others, entered a yard belonging to one Charlie Chaplin, where Collins shot Sylvester Morgan in the head, as a result of which the latter died. It was alleged that the killing arose out of a joint enterprise between the author and his co-accused. When the men were entering the yard, they allegedly said: "watch it, watch it, mek me shoot the boy". During the trial the author was identified by two witnesses, 13 and 14 years old, as one of the men participating in the killing. They testified, however, that they had not seen the author firing a shot himself, although he had been carrying a gun. One of the witnesses stated that, after the shot was fired, the author asked his co-accused: "You sure you shot the boy?". Four other witnesses testified having seen the author and three others running away after the incident while carrying guns.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Ms. Laure Moghaizel, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

2.3 The author gave a sworn statement to the effect that he had been at work at the time of the killing. No witnesses were called to support his alibi, however, and during cross-examination the author admitted that he had arrived home at 7.20 p.m. that day, while the murder allegedly had been committed around 7 p.m. The author further alleged that, after his arrest, the police officer had threatened him and fired shots over his head.

Complaint

3.1 The author states that he was arrested on 22 July 1983 and charged with murder on 30 July 1983, after having been detained for eight days without recourse to either a legal adviser, a member of his family or a friend. Preliminary examinations took place in August 1983 and September 1984. The author was kept in pre-trial detention until the start of the trial in December 1985, some 28 months later. According to the author the delay in bringing him to trial was caused by inadequacies in the Jamaican legal system, amounting to a violation of article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant.

3.2 The author further claims that he was severely prejudiced by this delay, since the witnesses no longer had the incident fresh in their minds and had been exposed to local gossip and publicity, because of which they had lost their impartiality. He also claims that, because of the lapse of time, potential defence witnesses could no longer be traced. In this connection, the author points out that after the preliminary examination in August 1983, he did not meet with his counsel until the day of the trial.

3.3 The author further alleges that he is a victim of a violation of article 14, subparagraphs 3 (b) and (d), since he was denied adequate time and facilities to prepare his defence. In this context, the author claims that he was deprived of adequate legal representation, both at his trial and at his appeal to the Court of Appeal of Jamaica. He submits that the legal aid counsel, who was originally assigned to represent him, failed to appear at the preliminary examination, and that he was then represented by a junior counsel. The author claims that he had no opportunity to instruct his counsel and that this counsel was only present at the first preliminary examination. Following the preliminary examination, the author had no contact with his legal representative until the day of the trial. He therefore alleges that he was denied the opportunity to prepare his defence, whereas the Prosecution had some 28 months to prepare its case.

3.4 As regards the appeal hearing, the author submits that he was represented by another counsel who had not previously been involved in the case. He alleges that this counsel never communicated with him before the hearing and that he, therefore, was not able to give him instructions as to the grounds of appeal. During the hearing, counsel submitted that there were no grounds to appeal the conviction, according to the author thereby effectively withdrawing his appeal without his consent. Counsel only addressed the Court on the matter of sentence, claiming that both the author and the co-accused had been under 18 years of age at the time of the killing and should therefore not be sentenced to death. The Appeal Court, however, found that research by the Registrar General had proven that the author was born on 31 December 1964 and that he was over the age of 18 years at the time of the murder. As the Prosecution failed to prove that the author's co-accused was over the age of 18 at the time of the offence, his sentence was varied to imprisonment during Her Majesty's pleasure.

3.5 The author further alleges that he was denied a fair hearing in violation of article 14, paragraph 1, of the Covenant, because the judge failed to direct the jury properly as to identification and manslaughter, which were central issues during the trial. In this connection, the author points out that the witnesses gave contradictory evidence with regard to the exact hour of the incident, some claiming that it happened around 7 p.m., others around 8 p.m. It is stated that, while it would still have been light at 7 p.m., it would have been dark at 8 p.m. The author claims that the darkness would have affected proper identification of the perpetrators and that the judge should have alerted the jury to the issue as to whether it was in fact dark, which he failed to do. He further alleges that the judge failed to bring to the attention of the jury certain other inconsistencies in the evidence and to warn the jury properly with regard to the need for caution in relying on identification evidence.

3.6 The author also claims that the judge did not direct the jury properly as regards the issue of joint enterprise in that he did not advert to the possibility that the author's co-accused, who was alleged to have fired the only shot, might have gone beyond what was tacitly agreed as part of the joint enterprise. In this connection, the author points out that the witnesses' evidence showed that the four men were looking for a Derrick Morgan, not for the deceased, and that the jury had to decide whether the author had indeed the intention to kill or do serious harm to the deceased. The author claims that it was open to the jury to find him guilty of manslaughter if he started out on an enterprise which envisaged some degree of violence and his co-accused went beyond the scope of the enterprise. However the judge allegedly instructed the jury that the author was to be convicted of murder or acquitted.

3.7 The author also alleges that he is a victim of a violation of article 6, paragraph 2, of the Covenant, since he has been sentenced to death after a trial during which the provisions of the Covenant were violated. In this connection, the author refers to the Committee's Views in Communication No. 250/1987.[3]

3.8 The author finally alleges that he is a victim of a violation by Jamaica of article 10 of the Covenant, since the State party fails to provide him with sufficient food, medical or dental care, and basic necessities for personal hygiene. To support his claims, the author encloses copy of a report by Professor W. E. Hellerstein, based on a study of the conditions in Jamaican prisons, conducted in January 1990.

State party's observations

4. By submission of 19 May 1994, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party argues that it is open to the author to seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

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[3] Carlton Ried v. Jamaica, Views adopted on 20 July 1990.

5. In a letter, dated 6 February 1995, counsel for the author refers to his initial communication and states that he has no further comments to make.

Committee's admissibility decision

6.1 At its fifty-third session, the Committee considered the admissibility of the communication.

6.2 The Committee ascertained, as required under article 5, subparagraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 The Committee took note of the State party's claim that the communication was inadmissible for failure to exhaust domestic remedies. The Committee recalled its prior jurisprudence and considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the case, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol. In this respect, the Committee therefore found that it was not precluded by article 5, subparagraph 2 (b), from considering the communication.

6.4 The Committee noted that part of the author's allegations related to the evaluation of evidence and to the instructions given by the judge to the jury. The Committee referred to its prior jurisprudence and reiterated that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it was not for the Committee to review specific instructions to the jury by the trial judge, unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee did not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.5 The Committee noted that the author, in support of his claim under article 10 of the Covenant, only referred to a general report about conditions in Jamaican prisons. The Committee considered that, in the absence of any information concerning the specific situation of the author, this claim had not been substantiated for purposes of admissibility. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.6 The Committee considered that the author and his counsel had sufficiently substantiated, for purposes of admissibility, that the delay in bringing the author to trial and his continued detention throughout this period might raise issues under article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant, which needed to be examined on the merits. The Committee also considered that the author's claim that he was denied time and facilities to prepare his defence and that his counsel effectively abandoned his appeal might raise issues under article 14, subparagraphs 3 (b) and (d), which needed to be examined on the merits.

7. Accordingly, the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under article 9, paragraph 3, and article 14, subparagraphs 3 (b), (c) and (d), *juncto* article 6, paragraph 2, of the Covenant.

State party's observations on the merits of the communication

8.1 By submission of 25 September 1996, the State party argues that the delay of 28 months between the author's arrest and the beginning of the trial against him does not constitute a violation of article 9, paragraph 3, and article 14, subparagraph 3 (c), because two preliminary hearings were held during that time. The State party submits that there is no basis for the assertion that this delay was undue or prejudicial to the author and points out that witnesses could have refreshed their memory from their own statements given shortly after the incident occurred.

8.2 The State party further is of the opinion that it cannot be held accountable for the manner in which counsel conducts a trial or argues an appeal.

Issues and proceedings before the Committee

9. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.1 The author has claimed that the delay in bringing him to trial, a period of more than 27 months (from his arrest on 22 July 1983 to the beginning of the trial on 9 December 1985) during which he remained in detention, is in violation of article 9, paragraph 3, and article 14, subparagraph 3 (c). The Committee notes that the author has stated that the preliminary enquiry against him was held in August 1983 and that the State party has not provided any information as to why it was adjourned or why the trial did not start until 26 months later. In the absence of any specific grounds from the State party as to why the trial only started 26 months after the adjournment of the preliminary enquiry the Committee is of the opinion that the delay in the instant case was contrary to the State party's obligation to bring an accused to trial without undue delay.

10.2 As regards the author's claim that he did not have adequate time and facilities for the preparation of his defence, the Committee notes that the information before it shows that the author was represented at trial by the same counsel who had represented him at the preliminary examination. The Committee further notes that neither the author nor counsel ever requested the Court for more time in the preparation of the defence. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14, subparagraph 3 (b), of the Covenant in respect to the author's trial.

10.3 The author has further complained that counsel who was assigned to represent him on appeal did not contact him before the appeal and that he did not advance any grounds for appeal against conviction. It appears from the judgment of the Court of Appeal that the author's counsel for the appeal (who had not represented him at the trial) conceded at the hearing that there were no arguments that he could put forward to affect the conviction. The Committee recalls that, while article 14, subparagraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appellate instances that the appeal has no merit. While it is not for the Committee to question counsel's professional judgment that there was no merit in the appeal against conviction, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed, so that he can consider any other remaining options open to him. In the circumstances, the Committee concludes that the author was not effectively represented on appeal, in violation of article 14, subparagraphs 3 (b) and (d).

10.4 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal".[4] In the present case, since the final sentence of death was passed without effective representation for the author on appeal, there has consequently also been a violation of article 6 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraph 3, and article 14, subparagraphs 3 (b), (c) and (d), and consequently of article 6, paragraph 2, of the International Covenant on Civil and Political Rights.

12. Under article 2, subparagraph 3 (a), of the Covenant, Mr. Steadman is entitled to an effective remedy. The Committee is of the opinion that in the circumstances of the case, the author is entitled to an appropriate remedy. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

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[4] See CCPR/C/21/Rev.1, page 7, paragraph 7.

D. Communication No. 529/1993; Hervin Edwards v. Jamaica (Views adopted on 28 July 1997, sixtieth session)*

Submitted by:	Hervin Edwards (represented by Mr. Saul Lehrfreund)
Victim:	The author
State party:	Jamaica
Date of communication:	19 January 1993 (initial submission)
Date of decision on admissibility:	31 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 1997,

Having concluded its consideration of Communication No. 529/1993 submitted to the Human Rights Committee by Mr. Hervin Edwards, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Hervin Edwards, a Jamaican citizen, who at the time of submission of the communication was awaiting execution at St. Catherine District Prison and is currently serving a life sentence at the General Penitentiary in Kingston, Jamaica. He claims to be a victim of violations by Jamaica of article 7 and article 14, subparagraph 3 (b), *juncto* article 6, paragraph 2, of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Saul Lehrfreund, of the law firm of Simons Muirhead and Burton in London.

Facts as submitted by the author

2.1 The author was arrested on 31 December 1983 and charged with the murder, on 29 December 1983, of his wife. On 12 June 1984, he was found guilty as charged and sentenced to death by the Manchester Circuit Court. The Court of Appeal dismissed his appeal on 22 January 1986. The murder for which the author stands convicted was initially classified as a capital murder under the Offences Against the Person (Amendment) Act of 1992. On review, the Court of Appeal reclassified the author's offence as non-capital on 28 March 1995.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

2.2 The first prosecution witness, a trainee policeman, testified that on 29 December 1983, at around 1.15 p.m., he saw the author walking with his son and wife, from whom he was separated at that time. He saw the author push his wife to the ground, take out a machete, and strike her four or five times in the region of the chest and neck, as a result of which she died. On the issue of identification, he testified that he had known the author for seven years, that during the attack he had shouted at the author who then looked up, and that, after having struck his wife, the author ran towards him before disappearing into a side road. The author's son followed the author, but was stopped by the policeman.

2.3 The second prosecution witness, a police officer who had known the author for 15 years, stated that in the morning of 29 December 1983, he had gone to the author's home, following a report that the author had taken his child from his wife's custody. He saw the author, his wife and their child leave together, but later saw the wife without the child. He then told the author to return the child to his wife. Another witness for the prosecution, the arresting officer, testified that after being cautioned, the author said: "She a tell me a hot word and me got vex and me chop her".

2.4 In an unsworn statement from the dock, the author contended that on 29 December 1983, he had been working all day on his allotment. No evidence was given in support of his alibi. He further stated that he was wearing clothes different from those worn by the attacker, and that he had instructed the police to find the clothes he had been wearing on the day of the crime.

2.5 The author was represented by a privately retained lawyer during the preliminary hearing and on trial, and by another privately retained lawyer on appeal. The application for leave to appeal against conviction and sentence was based on the grounds that there was insufficient evidence to warrant a conviction, but at the hearing of the appeal, the author's lawyer conceded to the Court that he was unable to find any grounds on which to argue the appeal.

2.6 As to the requirement of exhaustion of domestic remedies, leading counsel in London advised on 7 November 1990 that there were no reasonable prospects of success for a petition for special leave to appeal to the Judicial Committee of the Privy Council. Leading counsel referred in particular to the strong identification evidence of the first prosecution witness, to the fact that the judge's summing up to the jury was in accordance with the relevant rules, and that the author's alibi was seriously undermined by the evidence of the second prosecution witness. It is submitted that a petition for special leave to appeal to the Judicial Committee of the Privy Council would not constitute an available and effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

Complaint

3.1 The author submits that he was not adequately represented on trial. He submits that he saw his lawyer only fifteen minutes prior to the preliminary hearing, and that he did not see her again until the day of the trial. He complains that she did not ask him for instructions and that she should have requested an adjournment in order to properly prepare the defence. Furthermore, she did not contact any witnesses to testify on his behalf and failed to cross-examine the prosecution witnesses on essential issues, such as the clothes worn by the attacker and the confession statement he allegedly made to the arresting officer. The inadequate conduct of the author's defence counsel is said to amount to a violation of article 14, subparagraph 3 (b), of the Covenant. It is further submitted that, as a result, article 6, paragraph 2, has also been violated, since a sentence of death was passed upon the author after a trial in which the provisions of the Covenant have not been respected.

3.2 The author points out he was sentenced to death on 12 June 1984 and argues that the execution of a sentence of death after such a long period would, because of the extreme anguish caused by the delay, amount to cruel, inhuman and degrading treatment, within the meaning of article 7 of the Covenant.

3.3 The author submits that he has been subjected to the deplorable conditions of detention at St. Catherine District Prison. In this context, he submits that he has spent the past 10 years alone in a cell measuring 6 feet by 14 feet, being let out for three and a half hours a day. He has no recreational facilities and receives no books.

3.4 Counsel concedes that the author has not applied to the Supreme (Constitutional) Court of Jamaica for redress. He argues that a constitutional motion in the Supreme Court would inevitably fail, in light of the precedent set by the Judicial Committee of the Privy Council in the cases of DPP v. Nasralla and Riley and others v. Attorney General of Jamaica, where it was held that the Jamaican constitution was intended to prevent the enactment of unjust laws and not unjust treatment under the law. Since the author claims unjust treatment under the law, and not that post constitutional laws are unconstitutional, a constitutional motion would not be an effective remedy in his case. Counsel further argues that, if it were accepted that a constitutional motion is a final remedy to be exhausted, it would not be available to the author because of his lack of funds, the absence of legal aid for the purpose and because of the unwillingness of Jamaican lawyers to represent applicants on a pro bono basis. In support of his contention, counsel states that the author informed him that, although he had a privately retained lawyer on trial and appeal, it was his family who paid counsel's fees and that he is thus not in a position to privately retain a lawyer for the purpose of filing a constitutional motion.

State party's observations

4. The State party notes that on 28 March 1995, the Court of Appeal reviewed the author's case and reclassified the offence as non-capital murder. His death sentence was changed by law to one of life imprisonment. The author is to serve seven more years of detention, counted from the date of reclassification, before he becomes eligible for parole.

Committee's decision on admissibility

5.1 During its fifty-fifth session, the Committee considered the admissibility of the communication. It noted that in respect of the author's conviction, leading counsel in London had advised that a petition for special leave to appeal to the Judicial Committee of the Privy Council would have no prospect of success. Given leading counsel's uncontested opinion, the Committee considered that a petition for special leave to appeal to the Judicial Committee of the Privy Council was not an effective remedy which the author had to exhaust for purposes of the Optional Protocol.

5.2 With regard to the author's claim about inadequate legal representation, the Committee observed that the author's lawyer had been privately retained. It considered that the State party could not be held accountable for alleged errors made by a privately retained lawyer, unless it should have been manifest to the judge or the judicial authorities that the lawyer's behaviour was incompatible with the interests of justice. The Committee considered that, in the instant case, there had been no indication that the author's defence suffered from such defect. This part of the communication was incompatible with the provisions of the Covenant and was declared inadmissible under article 3 of the Optional Protocol.

5.3 With regard to the author's claim that the execution of a sentence of death after more than ten years on death row would amount to cruel, inhuman and degrading punishment, the Committee observed that following the reclassification of his offence as non-capital the author was no longer under the threat of execution. With regard to the question whether his lengthy stay on death row could amount to a violation of article 7 of the Covenant, the Committee referred to its jurisprudence "that prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, and that, in capital cases, even prolonged periods of detention on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment".[5] In the instant case, the Committee wished to examine on the merits whether the length of Mr. Edward's detention on death row was the result of delays imputable to the State party and whether there were other compelling circumstances particular to the author, including the conditions of his imprisonment, which would amount to a violation of article 7 and article 10, paragraph 1, of the Covenant.

5.4 Accordingly, on 31 October 1995, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under article 7 and article 10, paragraph 1, of the Covenant.

State party's submission on the merits and counsel's comments

6.1 By submission of 4 November 1996, the State party points out that the allegations relating to article 7 and article 10, paragraph 1, relate to the fact that the author spent 10 years on death row before his offence was reclassified as non-capital and a further two years until he was actually taken off death row after commutation of sentence.

6.2 The State party states that the author was arrested on 31 December 1983 and tried and convicted on 12 June 1984, a period of seven months. The author's appeal was dismissed on 22 January 1986, 18 months after conviction. It was not until four years later, 7 November 1990, that an opinion was obtained from leading counsel in London as to whether there were or not reasonable prospects of success for a petition to the Privy Council. The author's crime was reclassified as non-capital by the Offences against the Person (Amendment) Act of 1992. The State party categorically rejects that the time the author has spent on death row can be imputed to it.

7.1 In his comments, counsel contends that the issues arising under article 7 and article 10, paragraph 1, involve the responsibility of the State party, since it was the State party that kept the author on death row for over 11 years between 12 June 1984 and 10 July 1995. Counsel contends that this delay in carrying out the death sentence is attributable to the State party. In support of his claim, counsel refers the Privy Council judgment in Pratt [1994]2 AC 1, where their Lordships held that:

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[5] See Views on Communication No. 373/1989 (Lennon Stephens v. Jamaica), adopted on 18 October 1995, paragraph 9.4. See also Views on Communication No. 270/1988 and Communication No. 271/1988, Barret and Sutcliffe v. Jamaica, adopted on 30 March 1992, paragraph 8.4.

> "a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve";

as well as to the individual opinions appended to the Committee's Views on Communication No. 588/1994 (Errol Johnson v. Jamaica), where it was held that:

> "the physical and psychological treatment of the prisoner, his age and his health must be taken into consideration in order to evaluate the State's behaviour in relation of articles 7 and 10, paragraph 1".

Examination of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee must determine whether the length of time the author spent on death row - 11 years and 1 month - amounts to a violation of article 7 and article 10, paragraph 1, of the Covenant. Counsel has claimed a violation of these provisions by reference to the length of time Mr. Edwards was confined to death row. It remains the Committee's jurisprudence that detention on death row for a specific time does not violate article 7 and article 10, paragraph 1, in the absence of some further compelling circumstances. The Committee refers in this context, to its Views on Communication No. 588/1994[6] in which it explained and clarified its jurisprudence on this issue. In the Committee's opinion, neither the author nor his counsel have shown the existence of further compelling circumstances beyond the length of detention on death row. While a period of detention on death row[7] of over eleven years is a matter of serious concern, the Committee concludes that length of time does not per se constitute a violation of article 7 and article 10, paragraph 1.

8.3 With regard to the conditions of detention at St. Catherine's District Prison, the Committee notes that in his original communication the author made specific allegations, in respect of the deplorable conditions of detention. He alleged that he was held for the period of 10 years alone in a cell measuring 6 feet by 14 feet, let out only for three and half hours a day, was provided with no recreational facilities and received no books. The State party made no attempt to refute these specific allegations. In these circumstances, the Committee takes the allegations as proven. It finds that holding a prisoner in such conditions of detention constitutes not only a violation of article 10, paragraph 1, but, because of the length of time in which the author was kept in these conditions, also a violation of article 7.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 7 and article 10, paragraph 1, of the Covenant.

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[6] Communication No. 588/1994 (Errol Johnson v. Jamaica), Views adopted on 22 March 1996, paras. 8.2 to 8.5.

[7] During the period the author remained on death row (1984-1992) until the Offences against Persons (Amendment) Act, was enacted, the State party observed various moratoriums on executions.

10. In accordance with article 2, subparagraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Edwards with an effective remedy, entailing compensation for the conditions of detentions suffered while on death row. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken in connection with the Committee's Views.

E Communication No. 533/1993; Harold Elahie v. Trinidad and Tobago (Views adopted on 28 July 1997, sixtieth session[*]

Submitted by:	Harold Elahie
Victim:	The author
State party:	Trinidad and Tobago
Date of communication:	20 February 1992 (initial submission)
Date of decision on admissibility:	12 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 1997,

Having concluded its consideration of Communication No. 533/1993 submitted to the Human Rights Committee by Mr. Harold Elahie, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Harold Elahie, a Trinidadian citizen, currently serving four years' imprisonment with hard labour at the State Prison, Trinidad and Tobago. He claims to be a victim of violations of his human rights by Trinidad and Tobago, but does not invoke any provision of the International Covenant on Civil and Political Rights. The author's release was scheduled for 26 November 1996.

Facts as submitted by the author

2.1 The author was arrested on 6 July 1986 on charges of murder and several other offences (attempted murder, wounding with intent and shooting with intent). He was brought before a magistrate and remanded in custody. On 15 October 1986, the preliminary enquiry began; shortly afterwards, the author was told by his attorney that the magistrate had been suspended from his duties for alleged corruption.

2.2 The author was not brought before another magistrate until 22 February 1988. This magistrate continued the enquiry where it had been left in 1986. The author was committed to stand trial on 25 May 1988; it is not clear for which offence he was finally indicted. It appears from his letters that one of the indictments, dated 9 July 1990, was to be heard on 18 November 1990, but that prior to the hearing the defence filed a motion against this indictment on the ground that it was based on an illegal committal order. According to the author, the prosecution agreed and, on 19 March 1991, the judge quashed the indictment and ordered a new preliminary enquiry. The defence appealed the order, but it was apparently dismissed, since the author states: "[a] second enquiry was concluded against me by another magistrate".

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

2.3 A new trial was scheduled and on 25 March 1994, the author was sentenced to four years' imprisonment with hard labour, after pleading guilty to a charge of manslaughter.[8]

2.4 The author adds that he pleaded guilty of manslaughter, on his lawyer's advice, in order to clarify his situation and expedite the proceedings. He further states that his lawyer advised him not to appeal the sentence, as appeal proceedings would take longer than the time he had left to serve.

Complaint

3.1 Although the author does not invoke specific provisions of the Covenant, it transpires that he claims to be a victim of violations of article 10, paragraph 1, of the Covenant, on account of the conditions of his detention, and of article 9, paragraph 3, and article 14, subparagraph 3 (c), because of undue delay in the proceedings, as there was a seven-year delay between his arrest and detention and his conviction in 1994. He complains that he was detained for seven years and eight months before going to trial.

3.2 The author further claims that he is subjected to inhuman and degrading treatment in prison. In this context, he submits that he is detained, together with four inmates, in a small cell. They have nothing but a "piece of sponge" and old newspapers to sleep on, and food, which is not fit for human consumption, is thrown at them "as if they were pigs". Furthermore, whenever he is visited by his family, he is handcuffed to another prisoner. The author alleges that whenever inmates complain to the warders about the prison conditions, they are subjected to "the worst kind of brutality", and that they are never permitted to see the Commissioner of Prisons.

State party's information and observations on admissibility and the author's comments thereon

4. In a submission dated 20 March 1995, the State party confirms that the author has exhausted all available domestic remedies in regard to his complaint about the procedure adopted at the preliminary enquiry. It further concedes that the author has exhausted domestic remedies with respect to his complaints about prison conditions.

Committee's decision on admissibility

5. During its fifty-fifth session, the Committee considered the admissibility of the communication. It noted that the State party conceded that the author had exhausted available domestic remedies and observed that with respect to the author's complaint that he was not treated with humanity and with respect for the inherent dignity of the human person while in detention, he had substantiated this claim for it to be considered on its merits.

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[8] The State party, in its submission, observes that the author was sentenced on 25 March 1994 for manslaughter, and that the other charges were dropped.

6.1 The Committee further considered that the author had sufficiently substantiated, for purposes of admissibility, that the delay in bringing him to trial and his continued detention throughout this period, without the benefit of bail and the time already served not having been taken into account, might raise issues under article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant, which needed to be examined on the merits.

6.2 On 12 October 1995, the Human Rights Committee declared the communication admissible inasmuch as it appeared to raise issues under article 10, paragraph 1; article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant.

Further information received from the State party

7.1 In a further submission on admissibility received after the adoption of the admissibility decision the State party stated that, on 19 March 1991, the author's original indictment has been quashed on the ground that: "it was founded upon a committal which was void, illegal, of no effect, and *ultra vires* the Indictable Offences (Preliminary Enquires) Act". The judge ordered that the indictment be quashed and that a new preliminary enquiry be commenced.

7.2 The result of the new preliminary enquiry was that the author was committed to stand trial for murder, attempted murder, wounding with intent and shooting with intent. At the trial in the Assize's court, the author pleaded guilty to manslaughter and, on 25 March 1994, was sentenced to four years' imprisonment with hard labour.

Examination of the merits

8.1 The Committee has considered the communication in the light of all the information provided by the parties as provided in article 5, paragraph 1, of the Optional Protocol. It notes with concern that, following the transmittal of the Committee's decision on admissibility, the State party has provided no further information. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party examine in good faith all allegations brought against it, and that it provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, despite a reminder being sent on 11 March 1997, due weight must be given to the author's allegations, to extent that they have been substantiated.

8.2 The Committee notes that the information before it shows that the author was arrested on 6 July 1986, that shortly after the preliminary enquiry began, the magistrate to whom the case was assigned was suspended and that the author was not brought before a new magistrate until 22 February 1988. He was committed to stand trial on 25 May 1988. A constitutional motion was filed, on 1 November 1990, resulting in the author's indictment being quashed and a new preliminary enquiry being ordered on 19 March 1991. The author was convicted of manslaughter on 25 March 1994. This chronology reveals that the author was in detention for seven years and eight months before being sentenced on a plea of guilty of manslaughter. The author received a sentence of four years of imprisonment with hard labour which would appear to have taken into account the time he had already served. Nevertheless, the Committee considers that, a period of seven years and eight months between the author's arrest and the start of the trial against him, does in the absence of any adequate explanations from the State party which would explain the delay, amount to a violation of article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant, since the trial against a person kept in detention was neither instituted nor completed within a reasonable time and since there were undue delays in the trial itself.

8.3 With regard to the author's allegations of conditions of detention and ill-treatment, the Committee notes that the State party has not offered any information to refute the author's allegations. Due weight must therefore be given to the author's allegation that he only had "a piece of sponge and old newspapers" to sleep on, "food not fit for human consumption" given to him, and that he was treated with brutality by the warders whenever complaints were made. In the Committee's view, the author was not treated with humanity and respect for the inherent dignity of the human person, in violation of article 10, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 10, paragraph 1; article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant.

10. Pursuant to article 2, subparagraph 3 (a), of the Covenant, the author is entitled to an effective remedy, including compensation for the ill-treatment suffered and the undue delays in the adjudication of his case. The Committee reaffirms the obligation to treat individuals deprived of their liberty with respect for the inherent dignity of the human person. The State party is under an obligation to ensure that similar events do not occur in the future.

11. Bearing in mind, that by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

F Communication No. 535/1993; Lloydell Richards v. Jamaica (Views adopted on 31 March 1997, fifty-ninth session)*

Submitted by:	Lloydell Richards [represented by Mr. Saul Lehrfreund]
Victim:	The author
State party:	Jamaica
Date of communication:	14 January 1993 (initial submission)
Date of decision on admissibility:	17 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1997,

Having concluded its consideration of Communication No. 535/1993 submitted to the Human Rights Committee on behalf of Mr. Lloydell Richards under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Lloydell Richards, a Jamaican citizen who at the time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 6, paragraph 2; article 7; article 14, paragraphs 1 and 2, subparagraphs 3 (c), (d) and (e), and paragraph 5, of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund. The author's death sentence has been commuted.

Facts as presented by the author

2.1 On 15 March 1982, the author was charged with the murder, on 8 or 9 March 1982, in the Parish of Westmoreland, of one S. L. On 26 September 1983, he appeared before the Home Circuit Court of Kingston; on arraignment. He pleaded guilty to manslaughter, a plea accepted by the prosecution. Counsel for the defence then requested an adjournment in order to call character witnesses in mitigation. The hearing was adjourned to 3 October 1983. However, the

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Ms. Laure Moghaizel, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

** Two individual opinions (dissenting) by Committee members Nisuke Ando and David Kretzmer are appended to the present document.

Director of Public Prosecutions, who has the authority, pursuant to section 94, paragraph 3 (c), of the Jamaican Constitution, to discontinue any criminal proceedings at any stage before judgement is delivered, considered that the plea of guilty to manslaughter should not have been accepted and decided to discontinue the proceedings in the case in order to charge the author with the murder on a fresh indictment.

2.2 Accordingly, at the hearing of 3 October 1983, a nolle prosequi was entered by the Director of Public Prosecutions; the new indictment was read out to the author, who pleaded not guilty. On 6 December 1983, the author was tried in the Home Circuit Court of Kingston, then presided over by another judge. On 13 December 1983, he was found guilty of murder and sentenced to death. On appeal, counsel for the author argued that the trial had been unconstitutional in the light of the earlier acceptance by the prosecution of a plea of manslaughter. The Court of Appeal of Jamaica dismissed his appeal on 10 April 1987. The author subsequently petitioned the Judicial Committee of the Privy Council for special leave to appeal; on 20 February 1991, leave to appeal was granted. On 29 and 30 June 1992, the Privy Council heard the author's appeal and dismissed it on 19 October 1992, recommending that the author's death sentence be commuted. Following the enactment of the Offences against the Person (Amendment) Act 1992, Jamaica created two categories of murder, capital and non-capital, consequently all persons previously convicted of murder had their conviction reviewed and reclassified under the new system. In December 1992, the author's offence was classified as "capital".

2.3 The case for the prosecution was that, on 8 March 1982 at about 8 p.m., the author, who worked as a driver of a minibus, picked up S.L., who was living in Montego Bay. She was stranded in Savanna-la-mar and, although Montego Bay was not on the scheduled route, the author said that he would bring her home as he had completed the last trip of the day. He first dropped the conductor of the bus at his home. At 9 p.m., the author stopped and had drinks in a bar. The bar owner saw S.L. coming out of the bus and trying to obtain a lift from cars going in the direction of Montego Bay. When she did not succeed, she re-entered the bus and left with the author. At 1 a.m., a witness who knew the author saw him coming out of a guest house and pulling S.L., who was crying, into the minibus. Several hours later, the author, covered in mud and blood, appeared at the bus conductor's house. He said that the bus had been hijacked by three armed men and that they had ordered him to drive into the countryside. When the bus became stuck in the mud, he managed to escape; he further said that he feared for S.L.'s life. The author and a few other people, followed by the police, soon found the minibus and the body of S.L. was discovered in a shallow grave nearby. She had died as a result of a head injury; a blood-stained tool was found in the bus. The deceased's body also showed signs of rape.

2.4 The author gave an unsworn statement from the dock. He maintained that the bus had been hijacked and said that two of the prosecution witnesses were motivated by malice. He further stated that he had been tortured by the police.

Complaint

3.1 The author claims that his trial was unfair. He encloses two articles which appeared in a well-known Jamaican newspaper and submits that the information given was prejudicial to his case. One of the articles, published on 1 October 1983, stated "that the author had pleaded guilty to manslaughter in the case of the death of S.L., a 17-year-old school girl". It further stated "that some members of the judiciary felt that manslaughter did not arise in a case of that nature", and summarized the prosecution's case. The author points out that this article was published two days before he appeared in court to be sentenced on the basis of his manslaughter plea and before the prosecution entered the nolle prosequi. The second article, published on 4 October 1983, reported the proceedings of the previous day, and, according to the author, in a way prejudicial to his defence. The author said that he had already pleaded guilty to manslaughter, thus depriving himself of the right to a fair trial before an independent and impartial tribunal, contrary to article 14, paragraph 1, of the Covenant.

3.2 The author further claims that the publicity given to the proceedings violated his right to be presumed innocent until proven guilty according to law.

3.3 The author points out that he was arrested on 9 March 1982, tried on 6 December 1983 and that the Court of Appeal dismissed his appeal on 10 April 1987. He submits that a delay of one year and nine months before being tried, and of three years and four months before hearing his appeal, is unreasonable, thus violating his rights under article 14, subparagraph 3 (c) and paragraph 5, of the Covenant.

3.4 With regard to article 14, subparagraph 3 (d), the author notes that, on 26 September 1983, when he pleaded guilty to manslaughter, he was represented by leading counsel, Mr. C.M., who requested an adjournment. At the hearing on 3 October 1983, he was again represented by C.M., who had been notified by the prosecution of its intention to enter a nolle prosequi. Prior to the hearing on 6 December 1983, C.M. applied to withdraw from the case on professional ethical grounds and requested an adjournment because junior counsel, who would take over the defence, could not attend the hearing. The judge refused both requests, primarily on the ground that the trial had already been postponed several times and criticized C.M. for not having started his investigations in Westmoreland until 27 November 1983 and for not having informed his client of his position. C.M. then indicated that he would remain for the defence that day. In the circumstances, the author submits, he was not adequately represented by C.M.

3.5 The author further claims that junior counsel was not in a position to effectively represent him, which she herself admitted. In this context, he notes that, on 7 December 1983, she, while apologizing to the Court for having been absent on the first day of the trial, said: "But I wish to indicate to the Court that I have no intention of taking or accepting any money from the Government for this case, because I feel that I have not given it my best and, in the circumstances, I am here this morning to 'fight the good fight with all my might'; but I will not, because I don't feel it is justified and my conscience would not allow me, accept any money in relation to this legal aid assignment, but I am here to protect my client."

3.6 The author points out that on Friday, 9 December 1983, just before the end of the hearing, counsel indicated that an expert witness, a medical doctor, would be called to give evidence on behalf of the defence. On Monday, 12 December 1983, she stated, however, that the witness was not available. No other witnesses were called for the defence. According to the author, this amounts to a violation of article 14, subparagraph 3 (e), of the Covenant.

3.7 In the light of the above, article 6, paragraph 2, is said to have been violated, since the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of this provision.

3.8 The author submits that, during the interrogation on 9 March 1982, he was tortured by the police. He alleges that the officer who arrested him held him by the shirt in a choking position so that he was unable to reply to any of the questions. Later that day, he was taken to an office where, allegedly, he was "mobbed" by five or six police officers, who sprayed tear-gas in his eyes, ears and nostrils, and hit him with a stick. As a result, he submits, he could not see or hear well for a number of days and was unable to drink for 17 days. He claims that he was denied medical treatment.

3.9 It is submitted that the execution of the author at this point in time would amount to a violation of article 7, because of the delays in adjudicating the case and the time spent on death row. In support of this contention, it is submitted that the Privy Council, when dismissing the author's appeal, expressed its concern about the delays in the judicial proceedings in the case, and recommended that the death sentence be commuted. Furthermore, the author is said to have been subjected to cruel, inhuman and degrading treatment and punishment while being held in the death row section of St. Catherine District Prison where the living conditions are said to be appalling. Finally, the mental anguish and anxiety resulting from prolonged detention on death row, exacerbated by the changing attitudes of the Jamaican authorities in carrying out executions, are said to constitute a separate violation of article 7.

3.10 As to the exhaustion of domestic remedies, the author concedes that he has not applied to the Supreme (Constitutional) Court of Jamaica for redress. He argues that a constitutional motion in the Supreme Court would inevitably fail, in the light of the precedent set by the Judicial Committee's decisions in DPP v. Nasralla [(1967) 2 ALL ER 161] and Riley et al. v. Attorney General of Jamaica [(1982) 2 ALL ER 469], where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law. Since he claims unfair treatment under the law, and not that post-constitutional laws are unconstitutional, a constitutional motion would not be an effective remedy in his case. He further argues that even if it were accepted that a constitutional motion is a final remedy to be exhausted, it would not be available to him because of his lack of funds, the absence of legal aid for this purpose and the unwillingness of Jamaican lawyers to represent applicants on a pro bono basis for the purpose.

State party's observations on admissibility and counsel's comments

4. By submission of 23 June 1993, the State party argued that the communication was inadmissible for failure to exhaust domestic remedies. In this context, the State party argued that it is open to the author to seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

5. In his comments, counsel reiterated that the constitutional motion was not an effective and available domestic remedy in the author's case. In this context, he refers to the Committee's jurisprudence that, in the absence of legal aid, a constitutional motion is not an available remedy. It was stated that the constitutionality of the execution of the death sentence cannot be brought before the Judicial Committee of the Privy Council without first exhausting domestic remedies through the Supreme (Constitutional) Court.

Committee's decision on admissibility

6.1 At its fifty-third session, the Committee considered the admissibility of the communication. It noted the State party's claim that the communication was inadmissible for failure to exhaust domestic remedies. The Committee recalled its constant jurisprudence that for purposes of article 5, subparagraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. As regards the State party's argument that a constitutional remedy was still open to the author, the Committee noted that the Supreme Court of Jamaica had, in some cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed. However, the Committee also recalled that the State party has indicated on several occasions that no legal aid is made available for constitutional motions. The Committee considered that, in the absence of legal aid, a constitutional motion does not, in the circumstances of the instant case, constitute an available remedy which needs to be exhausted for purposes of the Optional Protocol. In this respect, the Committee therefore found that it was not precluded by article 5, subparagraph 2 (b), from considering the communication.

6.2 The Committee considered that the author and his counsel had sufficiently substantiated for purposes of admissibility the claim that the trial against the author did not fulfil the requirements laid down in article 14 of the Covenant. The Committee found that the entering of nolle prosequi by the prosecution after the author had pleaded guilty to manslaughter and the publicity connected thereto may have affected the presumption of innocence in the author's case. The Committee also found that the judge's refusal to adjourn the trial after counsel had indicated that he was no longer willing to represent him may have affected the author's right to prepare his defence adequately and to obtain the attendance of witnesses on his behalf. Further, the Committee found that the delay in the judicial proceedings might raise issues under article 14, subparagraph 3 (c) and paragraph 5, of the Covenant. The Committee considered that these issues needed to be examined on the merits.

6.3 The Committee considered that, in the absence of information provided by the State party, the author had sufficiently substantiated, for purposes of admissibility, his claim that he was subjected to ill-treatment upon arrest and subsequently denied medical treatment. This claim might raise issues under articles 7 and 10 of the Covenant, which needed to be examined on the merits.

6.4 The Committee next turned to the author's claim that his prolonged detention on death row amounted to a violation of article 7 of the Covenant. While the Committee had taken due note of the judgement of the Privy Council in the case of Earl Pratt and Ivan Morgan (which the author has apparently not invoked in the domestic courts of Jamaica), it reiterated its prior jurisprudence that lengthy detention on death row does not, per se, constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant. The Committee observed that the author had not substantiated, for purposes of admissibility, any specific circumstances of his case that would raise an issue under article 7 of the Covenant. This part of the communication was therefore deemed inadmissible under article 2 of the Optional Protocol.

Examination on the merits

7.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, following the transmittal of the Committee's decision on admissibility, no further information has been received from the State party clarifying the matter raised by the present communication. The deadline for submission of the State party's information and observations under article 4, paragraph 2, of the Optional Protocol expired on 1 November 1995. No additional information has been received from the State party in spite of a reminder addressed to it on 2 August 1996. The Committee recalls that in accordance with article 4, paragraph 2, of the Optional Protocol, a State party must examine in good faith all the allegations brought against it, and provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the allegations submitted by the author, to the extent that they have been substantiated.

7.2 The author has claimed that his trial was unfair because the prosecution entered a nolle prosequi plea after the author had pleaded guilty to a charge of manslaughter. The author claims that the extent of media publicity given to his guilty plea negated his right to presumption of innocence and thus denied him the right to a fair trial. The Court of Appeal of Jamaica acknowledged the possibility of disadvantage to the author at presenting his defence at the trial, but observed that "nothing shows that the convicting jury was aware of this". The entry of a nolle prosequi was found by the Jamaican courts and the Judicial Committee of the Privy Council to be legally permissible, as under Jamaican law the author had not been finally convicted until sentence was passed. The question for the Committee is not, however, whether it was lawful, but whether its use was compatible with the guarantees of fair trial enshrined in the Covenant in the particular circumstances of the case. Nolle prosequi is a procedure which allows the Director of Public Prosecutions to discontinue a criminal prosecution. The State party has argued that it may be used in the interests of justice and that it was used in the present case to prevent a miscarriage of justice. The Committee observes, however, that the Prosecutor in the instant case was fully aware of the circumstances of Mr. Richards' case and had agreed to accept his manslaughter plea. The nolle prosequi was used, not to discontinue proceedings against the author, but to enable a fresh prosecution against the author to be initiated immediately, on exactly the same charge in respect of which he had already entered a plea of guilty to manslaughter, a plea which had been accepted. Thus, its purpose and effect were to circumvent the consequences of that plea, which was entered in accordance with the law and practice of Jamaica. In the Committee's opinion, the resort to a nolle prosequi in such circumstances and the initiation of a further charge against the author was incompatible with the requirements of a fair trial within the meaning of article 14, paragraph 1, of the Covenant.

7.3 With regards to the further claims of violations of article 14, subparagraphs 3 (b), (c) and (e) and paragraph 5, in respect of the author's inadequate representation, and undue delay in the proceedings, the Committee expresses its concern with the allegations made. However, the Committee is of the view that in the light of the original flaw in the author's trial as stated above, it need not make a finding on these issues.

7.4 With respect to the author's allegation regarding his ill-treatment upon arrest and the subsequent denial of medical treatment, the Committee notes that this was put before the jury and the jury rejected it, and moreover that the author chose to make an unsworn statement from the dock which prevented his cross-examination on the subject. In the circumstances of the present case, the Committee considers that there has been no violation of article 7 and article 10, paragraph 1, of the Covenant.

7.5 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General

Comment 6 [16], the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review of the conviction and sentence by a higher tribunal". In the present case, since the final sentence of death was passed without having observed the requirements of article 14 concerning fair trial and presumption of innocence it must be concluded that the right protected by article 6 of the Covenant has been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 1, and, consequently, article 6, of the Covenant.

9. Pursuant to article 2, subparagraph 3 (a), of the Covenant, the author is entitled to an effective remedy. The Committee notes that the State party has commuted the author's death sentence and considers that this constitutes sufficient remedy in this case.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

APPENDIX

A. Individual opinion by Nisuke Ando (*dissenting*)

[Original: English]

I am unable to persuade myself to share the Committee's Views in the present case for the following reasons:

In my opinion, the purpose of a criminal trial is to ascertain what actually took place in the case at issue, that is, to find "true facts" of the case, on which conviction and sentence should be based. Of course, "true facts" as submitted by the defendant may differ from "true facts" as submitted by the prosecution, and since defendants are generally at a disadvantage compared to the prosecution, various procedural guarantees exist to secure a "fair trial". The requirement of equality of arms, rules of evidence, control of the proceedings by independent and impartial judges, deliberation and decision by neutral juries, and the system of appeals are all part of these guarantees.

In the present case, the author initially pleaded guilty to manslaughter, which was accepted by the prosecution. However, the Director of Public Prosecution, who has authority to discontinue any criminal proceedings at any stage before judgement is delivered, considered that the plea of guilty of manslaughter should not have been accepted and decided to discontinue proceedings in the case, in order to charge the author with murder on a fresh indictment (see paragraph 2.1). Consequently, a nolle prosequi was entered by the prosecution to discontinue the proceedings and the new indictment of murder was entered. In the subsequent trial, the author was found guilty of murder and sentenced to death. His appeal to the Court of Appeal of Jamaica was dismissed, and the Judicial Committee of the Privy Council, which granted the author special leave to appeal, heard his appeal and dismissed it (see paragraph 2.2).

In the Committee's view, the resort to a nolle prosequi in the present case, and the initiation of a further charge against the author, were incompatible with the requirements of a fair trial within the meaning of article 14, paragraph 1, of the Covenant (see paragraph 7.2). However, in my opinion, fairness of the trial in the present case must not be determined solely on the basis of the use of nolle prosequi by the prosecution. Such determination requires careful appreciation of all the relevant circumstances, including the handling of a nolle prosequi by the judges concerned, those at first instance, at the Court of Appeal, and in the Judicial Committee of the Privy Council. It is my understanding that judges need not accept the prosecution's charge entered after its resort to a nolle prosequi. It is also my understanding that the independence and impartiality of judges are well established in Jamaica as well as in the United Kingdom. Considering all these circumstances and the very purpose of a criminal trial as stated above, I am unable to persuade myself to share the Committee's Views that the use of a nolle prosequi by the prosecution at the initial stage made the author's trial in its entirety an unfair one, in violation of article 14, paragraph 1, of the Covenant.

B. Individual opinion by David Kretzmer (*dissenting*)

[Original: English]

Like my colleague Nisuke Ando, I am unable to agree with the Committee's view that the State party violated the author's right to a fair trial under article 14, paragraph 1, of the Covenant.

In December 1993, the author was tried for murder by a judge and jury under the regular proceedings of the Jamaican legal system. He was found guilty by the jury which heard and assessed all the evidence against him. The Committee does not point to any departure during this trial from the minimum guarantees specified in article 14, paragraph 3, of the Covenant. It bases its finding of a violation of article 14, paragraph 1, solely on the fact that the trial was held subsequent to nolle prosequi being entered by the Director of Public Prosecutions, after the author had pleaded guilty to a charge of manslaughter in the initial trial on the same charges.

While the lack of coordination between the prosecutor in the first trial, who consented to the plea of manslaughter, and the Director of Public Prosecutions, who entered the nolle prosequi, was clearly unfortunate, I cannot agree that this lack of coordination inevitably meant that the author was denied a "fair and public hearing by a competent, independent and impartial tribunal established by law" in the second trial. Had the defence in the second trial been of the opinion that the jury could not be independent and impartial since it would be influenced by press reports of the author's guilty plea in the first trial, it could have raised this point at the beginning of the trial, or made an attempt to challenge the jurors. It did neither. Furthermore, in his summing up to the jury, the judge made it quite clear to the jurors that they were to base their verdict solely on the evidence presented to them. There was strong evidence against the author and there is nothing to suggest that the jurors ignored the directions of the judge. I am therefore of the opinion that there is no adequate basis for finding a violation of article 14, paragraph 1, of the Covenant, in the present case.

G. Communication No. 538/1993; Charles E. Stewart v. Canada (Views adopted on 1 November 1996, fifty-eighth session)

Submitted by:	Charles E. Stewart [represented by counsel]
Victim:	The author
State party:	Canada
Date of communication:	18 February 1993 (initial submission)
Date of decision on admissibility:	18 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 1996,

Having concluded its consideration of Communication No. 538/1993 submitted to the Human Rights Committee on behalf of Mr. Charles E. Stewart under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol*

1. The author of the communication is Charles Edward Stewart, a British citizen born in 1960. He has resided in Ontario, Canada, since the age of seven, and currently faces deportation from Canada. He claims to be a victim of violations by Canada of articles 7, 9, 12, 13, 17 and 23 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author was born in Scotland in December 1960. At the age of seven, he emigrated to Canada with his mother; his father and older brother were already, at the time, living in Canada. The author's parents have since separated, and the author lives together with his mother and with his younger brother. His mother is in poor health, and his brother is mentally disabled and suffers from chronic epilepsy. His older brother was deported to the United Kingdom in 1992, because of a previous criminal record. This brother apart, all of the author's relatives reside in Canada; the author himself has two young twin children, who live with their mother, from whom the author divorced in 1989.

2.2 The author claims that for most of his life, he considered himself to be a Canadian citizen. He claims that it was only when he was contacted by immigration officials because of a criminal conviction that he realized that, legally, he was only a permanent resident, as his parents had never requested Canadian citizenship for him during his youth. It is stated that between

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* The text of five individual opinions, signed by eight Committee members, is appended to the present document.

September 1978 and May 1991, the author was convicted on 42 occasions, mostly for petty offences and traffic offences. Two convictions were for possession of marijuana seeds and of a prohibited martial arts weapon. One conviction was for assault with bodily harm, committed in September 1984, on the author's former girlfriend. Counsel indicates that most of her client's convictions are attributable to her client's substance abuse problems, in particular alcoholism. Since his release on mandatory supervision in September 1990, the author has participated in several drug and alcohol rehabilitation programmes. He has further received medical advice to control his alcohol abuse and, with the exception of one relapse, has remained alcohol-free.

2.3 It is stated that although the author cannot contribute much financially to the subsistence of his family, he does so whenever he is able to and helps his ailing mother and retarded brother around the home.

2.4 In 1990, an immigration enquiry was initiated against the author pursuant to section 27, paragraph 1, of the Immigration Act. Under this provision, a permanent resident in Canada must be ordered deported from Canada if an adjudicator in an immigration enquiry is satisfied that the defendant has been convicted of certain specified offences under the Immigration Act. On 20 August 1990, the author was ordered deported on account of his criminal convictions. He appealed the order to the Immigration Appeal Division. The Board of the Appeal Division heard the appeal on 15 May 1992, dismissing it by judgment of 21 August 1992, which was communicated to the author on 1 September 1992.

2.5 On 30 October 1992, the author complained to the Federal Court of Appeal for an extension of the time limit for applying for leave to appeal. The Court first granted the request but subsequently dismissed the application for leave to appeal. There is no further appeal or application for leave to appeal from the Federal Court of Appeal to the Supreme Court of Canada, or to any other domestic tribunal. Thus, no further effective domestic remedy is said to be available.

2.6 If the author is deported, he would not be able to return to Canada without the express consent of the Canadian Minister of Employment and Immigration, under the terms of sections 19(1)(i) and 55 of the Immigration Act. A re-application for emigration to Canada would not only require ministerial consent but also that the author fulfil all the other statutory admissibility criteria for immigrants. Furthermore, because of his convictions, the author would be barred from readmission to Canada under section 19(2)(a) of the Act.

2.7 As the deportation order against the author could now be enforced at any point in time, counsel requests the Committee to seek from the State party interim measures of protection, pursuant to rule 86 of the rules of procedure.

Complaint

3.1 The author claims that the above facts reveal violations of articles 7, 9, 12, 13, 17 and 23 of the Covenant. He claims that in respect of article 23, the State party has failed to provide for clear legislative recognition of the protection of the family. In the absence of such legislation which ensures that family interests would be given due weight in administrative proceedings such as, for example, those before the Immigration and Refugee Board, he claims, there is a prima facie issue as to whether Canadian law is compatible with the requirement of protection of the family.

3.2 The author also refers to the Committee's General Comment on article 17, according to which "interference [with home and privacy] can only take place on the basis of law, which itself must be compatible with the provisions, aims and objectives of the Covenant". He asserts that there is no law which ensures that his legitimate family interests or those of the members of his family would be addressed in deciding on his deportation from Canada; there is only the vague and general discretion given to the Immigration Appeal Division to consider all the circumstances of the case, which is said to be insufficient to ensure a balancing of his family interests and other legitimate State aims. In its decision, the Immigration Appeal Division allegedly did not give any weight to the disabilities of the author's mother and brother; instead, it ruled that "taking into account that the appellant does not have anyone depending on him and there being no real attachment to and no real support from anyone, the Appeal Division sees insufficient circumstances to justify the appellant's presence in this country".

3.3 According to the author, the term "home" should be interpreted broadly, encompassing the (entire) community of which an individual is a part. In this sense, his "home" is said to be Canada. It is further submitted that the author's privacy must include the fact of being able to live within this community without arbitrary or unlawful interference. To the extent that Canadian law does not protect aliens against such interference, the author claims a violation of article 17.

3.4 The author submits that article 12, paragraph 4, is applicable to his situation since, for all practical purposes, Canada is his own country. His deportation from Canada would result in an absolute statutory bar from re-entering Canada. It is noted in this context that article 12(4) does not indicate that everyone has the right to enter his country of nationality or of birth but only "his own country". Counsel argues that the United Kingdom is no longer the author's "own country", since he left it at the age of seven and his entire life is now centred upon his family in Canada - thus, although not Canadian in a formal sense, he must be considered de facto a Canadian citizen.

3.5 The author affirms that his allegations under articles 17 and 23 should also be examined in the light of other provisions, especially articles 9 and 12. While article 9 addresses deprivation of liberty, there is no indication that the only concept of liberty is one of physical freedom. Article 12 recognizes liberty in a broader sense: the author believes that his deportation from Canada would violate "his liberty of movement within Canada and within his community", and that it would not be necessary for one of the legitimate objectives enumerated in article 12, paragraph 3.

3.6 The author contends that the enforcement of the deportation order would amount to cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant. He concedes that the Committee has not yet decided whether the permanent separation of an individual from his/her family and/or close relatives and the effective banishment of a person from the only country he ever knew and in which he grew up may amount to cruel, inhuman and degrading treatment; he submits that this is an issue to be determined on its merits.

3.7 In this connection, the author recalls that: (a) he has resided in Canada since the age of seven; (b) at the time of issue of the deportation order all members of his immediate family resided in Canada; (c) while his criminal record is extensive, it does by no means reveal that he is a danger to public safety; (d) he has taken voluntary steps to control his substance-abuse problems; (e) deportation from Canada would effectively and permanently sever all his ties in Canada; and (f) the prison terms served for various convictions already constitute adequate punishment and the reasoning of the Immigration Appeal Division, by emphasizing his criminal record, amounts to the imposition of additional punishment.

Special Rapporteur's request for interim measures of protection and State party's reaction

4.1 On 26 April 1993, the Special Rapporteur on New Communications transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations on the admissibility of the communication. Under rule 86 of the rules of procedure, the State party was requested not to deport the author to the United Kingdom while his communication was under consideration by the Committee.

4.2 In a submission dated 9 July 1993 in reply to the request for interim measures of protection, the State party indicates that although the author would undoubtedly suffer personal inconvenience should he be deported to the United Kingdom, there are no special or compelling circumstances in the case that would appear to cause irreparable harm. In this context, the State party notes that the author is not being returned to a country where his safety or life would be in jeopardy; furthermore, he would not be barred once and for all from readmission to Canada. Secondly, the State party notes that although the author's social ties with his family may be affected, his complaint makes it clear that his family has no financial or other objective dependence on him: the author does not contribute financially to his brother, has not maintained contact with his father for seven or eight years and, after the divorce from his wife in 1989, apparently has not maintained any contact with his wife or children.

4.3 The State party submits that the application of rule 86 should not impose a general rule on States parties to suspend measures or decisions at a domestic level unless there are special circumstances where such a measure or decision might conflict with the effective exercise of the author's right of petition. The fact that a complaint has been filed with the Committee should not automatically imply that the State party is restricted in its power to implement a deportation decision. The State party argues that considerations of State security and public policy must be considered prior to imposing restraints on a State party to implement a decision lawfully taken. It therefore requests the Committee to clarify the criteria at the basis of the Special Rapporteur's decision to call for interim measures of protection and to consider withdrawing the request for interim protection under rule 86.

4.4 In her comments, dated 15 September 1993, counsel challenges the State party's arguments related to the application of rule 86. She contends that deportation would indeed bar the author's readmission to Canada forever. Furthermore, the test of what may constitute "irreparable harm" to the petitioner should not be considered by reference to the criteria developed by the Canadian courts where, it is submitted, the test for irreparable harm in relation to family has become one of almost exclusive financial dependency, but by reference to the Committee's own criteria.

4.5 Counsel submits that the communication was filed precisely because Canadian courts, including the Immigration Appeal Division, do not recognize family interests beyond financial dependency of family members. She adds that it is the very test applied by the Immigration Appeal Division and the Federal Court which is at issue before the Human Rights Committee: it would defeat the effectiveness of any order the Committee might make in the author's favour in the future if the rule 86 request were to be cancelled now. Finally, counsel contends that it would be unjustified to apply a "balance of convenience" test in determining whether or not to invoke rule 86, as this test is inappropriate where fundamental human rights are at issue.

State party's admissibility observations and counsel's comments

5.1 In its submission under rule 91, dated 14 December 1993, the State party contends that the author has failed to substantiate his allegations of violations of articles 7, 9, 12 and 13 of the Covenant. It recalls that international and domestic human rights law clearly states that the right to remain in a country and not to be expelled from it is confined to nationals of that State. These laws recognize that any such rights possessed by non-nationals are available only in certain circumstances and are more limited than those possessed by nationals. Article 13 of the Covenant "delineates the scope of that instrument's application in regard to the right of an alien to remain in the territory of a State party. ... Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. Its purpose is clearly to prevent arbitrary expulsions. [The provision] aims to ensure that the process of expelling such a person complies with what is laid down in the State's domestic law and that it is not tainted by bad faith or the abuse of power". Reference is made to the Committee's Views in Communication No. 58/1979, Maroufidou v. Sweden.

5.2 The State party submits that the application of the Immigration Act in the instant case satisfied the requirements of article 13. In particular, the author was represented by counsel during the inquiry before the immigration adjudicator and was given the opportunity to present evidence as to whether he should be permitted to remain in Canada and to cross-examine witnesses. Based on evidence adduced during the inquiry, the adjudicator issued a deportation order against the author. The State party explains that the Immigration Appeal Board to which the author complained is an independent and impartial tribunal with jurisdiction to consider any ground of appeal that involved a question of law or fact, or mixed law and fact. It also has jurisdiction to consider an appeal on humanitarian grounds that an individual should not be removed from Canada. The Board is said to have carefully considered and weighed all the evidence presented to it, as well as the circumstances of the author's case.

5.3 While the State party concedes that the right to remain in a country might exceptionally fall within the scope of application of the Covenant, it is submitted that there are no such circumstances in the case: the decision to deport Mr. Stewart is said to be "justified by the facts of the case and by Canada's duty to enforce public interest statutes and protect society. Canadian courts have held that the most important objective for a government is to protect the security of its nationals. This is consistent with the view expressed by the Supreme Court of Canada that the executive arm of government is pre-eminent in matters concerning the security of its citizens ... and that the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country".

5.4 The State party argues that both the decision to deport Mr. Stewart and to uphold the deportation order met with the requirements of the Immigration Act, and that these decisions were in accordance with international standards; there are no special circumstances which would "trigger the application of the Covenant to justify the complainant's stay in Canada". Furthermore, there is no evidence of abuse of power by Canadian authorities and in the absence of such an abuse, "it is inappropriate for the Committee to evaluate the interpretation and application by those authorities of Canadian law".

5.5 As to the alleged violation of articles 17 and 23 of the Covenant, the State party argues that its immigration laws, regulations and policies are compatible with the requirements of these provisions. In particular, section 114(2) of the Immigration Act allows for the exemption of persons from any regulations made under the Act or the admission into Canada of persons where there exist compassionate or humanitarian considerations. Such considerations include the existence of family in Canada and the potential harm that would result if a member of the family were removed from Canada.

5.6 A general principle of Canadian immigration programs and policies is that dependants of immigrants into Canada are eligible to be granted permanent residence at the same time as the principal applicant. Furthermore, where family members remain outside Canada, the Immigration Act and ancillary regulations facilitate reunification through family class and assisted relative sponsorships: "[r]eunification in fact occurs as a result of such sponsorships in almost all cases".

5.7 In view of the above, the State party submits that any effects which a deportation may have on the author's family in Canada would occur further to the application of legislation that is compatible with the provisions, aims and objectives of the Covenant: "In the case at hand, humanitarian and compassionate grounds, which included family considerations, were taken into account during the proceedings before the immigration authorities and were balanced against Canada's duty and responsibility to protect society and to properly enforce public interest statutes".

5.8 In conclusion, the State party affirms that Mr. Stewart has failed to substantiate violations of rights protected under the Covenant and is in fact claiming a right to remain in Canada. He is said to be in fact seeking to establish an avenue under the Covenant to claim the right not to be deported from Canada: this claim is incompatible ratione materiae with the provisions of the Covenant and inadmissible under article 3 of the Optional Protocol.

6.1 In her comments, counsel notes that the State party wrongly conveys the impression that the author had two full hearings before the immigration authorities, which took into account all the specific factors in his case. She observes that the immigration adjudicator conducting the inquiry "has no equitable jurisdiction". Once he is satisfied that the person is the one described in the initial report, that this person is a permanent resident of Canada and that he has been convicted of a criminal offence, a removal order is mandatory. Counsel contends that the adjudicator "may not take into account any other factors and has no statutory power of discretion to relieve against any hardship caused by the issuance of the removal order".

6.2 As to the discretionary power, under section 114(2) of the Immigration Act, to exempt persons from regulatory requirements and to facilitate admission on humanitarian grounds, counsel notes that this power is not used to relieve the hardship of a person and his/her family caused by the removal of a permanent resident from Canada: "[T]he Immigration Appeal Division exercises a quasi-judicial statutory power of discretion after a full hearing, and it has been seen as inappropriate for the Minister or his officials to in fact 'overturn' a negative decision ... by this body".

6.3 Counsel affirms that the humanitarian and compassionate discretion delegated to the Minister by the Immigration Regulations can in any event hardly be said to provide an effective mechanism to ensure that family interests are balanced against other interests. In recent years, Canada is said to have routinely separated families or attempted to separate families where the interests of young children were at stake: thus, "the best interests of children are not taken into account in this administrative process".

6.4 Counsel submits that Canada ambiguously conveys the impression that family class and assisted relative sponsorships are almost always successful. This, according to her, may be true of family class sponsorships, but it is clearly not the case for assisted relative sponsorships, since assisted relative applicants must meet all the selection criteria for independent applicants. Counsel further dismisses as "patently wrong" the State party's argument that the Court, upon application for judicial review of a deportation order, may balance the hardship caused by removal against the public interest. The Court, as it has articulated repeatedly, cannot balance these interests, is limited to strict judicial review and cannot substitute its own decision for that of the decision maker(s), even if it would have reached a different conclusion on the facts: it is limited to quashing a decision because of jurisdictional error, a breach of natural justice or fairness, an error of law or an erroneous finding of fact made in a perverse or in a capricious manner (sect. 18(1) Federal Court Act).

6.5 As to the compatibility of the author's claims with the Covenant, counsel notes that Mr. Stewart is not claiming an absolute right to remain in Canada. She concedes that the Covenant does not, per se, recognize a right of non-nationals to enter or remain in a State. Nonetheless, it is submitted that the Covenant's provisions cannot be read in isolation but are interrelated: accordingly, article 13 must be read in the light of other provisions.

6.6 Counsel acknowledges that the Committee has held that article 13 provides for procedural and not for substantive protection; however, procedural protection cannot be interpreted in isolation from the protection provided under other provisions of the Covenant. Thus, legislation governing expulsion cannot discriminate on any of the grounds listed in article 26; nor can it arbitrarily or unlawfully interfere with family, privacy and home (article 17).

6.7 As to the claim under article 17, counsel notes that the State party has only set out the provisions of the Immigration Act which provide for family reunification - provisions which she considers inapplicable to the author's case. She adds that article 17 imposes positive duties upon States parties, and that there is no law in Canada which would recognize family, privacy, or home interests in the context raised in the author's case. Furthermore, while she recognizes that there is a process provided by law which grants to the Immigration Appeal Division a general discretion to consider the personal circumstances of a permanent resident under order of deportation, this discretion does not recognize or encompass consideration of fundamental interests such as integrity of the family. Counsel refers to the case of Sutherland as another example of the failure to recognize that integrity of the family is an important and protected interest. For counsel, there "can be no balancing of interests if ... family ... interests are not recognized as fundamental interests for the purpose of balancing. The primary interest in Canadian law and jurisprudence is the protection of the public ...".

6.8 Concerning the State party's contention that a "right to remain" may only come within the scope of application of the Covenant under exceptional circumstances, counsel claims that the process whereby the author's deportation was decided and confirmed proceeded without recognition or cognizance of the author's rights under articles 7, 9, 12, 13, 17 or 23. While it is true that Canada has a duty to ensure that society is protected, this legitimate interest must be balanced against other protected individual rights.

6.9 Counsel concedes that Mr. Stewart was given an opportunity, before the Immigration Appeal Division, to present all the circumstances of his case. She concludes, however, that domestic legislation and jurisprudence do not recognize that her client will be subjected to a breach of his fundamental rights if he were deported. This is because such rights are not and need not be considered given the way immigration legislation is drafted. Concepts such as home, privacy, family or residence in one's own country, which are protected under the Covenant, are foreign to Canadian law in the immigration context. The overriding concern in view of removal of a permanent resident, without distinguishing long-term residents from recently arrived immigrants, is national security.

Committee's decision on admissibility

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee noted that it was uncontested that there were no further domestic remedies for the author to exhaust, and that the requirements of article 5, subparagraph 2 (b), of the Optional Protocol had been met.

7.3 Inasmuch as the author's claims under articles 7 and 9 of the Covenant are concerned, the Committee examined whether the conditions of articles 2 and 3 of the Optional Protocol were met. In respect of articles 7 and 9, the Committee did not find, on the basis of the material before it, that the author had substantiated, for purposes of admissibility, his claim that deportation to the United Kingdom and separation from his family would amount to cruel or inhuman treatment within the meaning of article 7, or that it would violate his right to liberty and security of person within the meaning of article 9, paragraph 1. In this respect, therefore, the Committee decided that the author had no claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

7.4 As to article 13, the Committee noted that the author's deportation was ordered pursuant to a decision adopted in accordance with the law and that the State party had invoked arguments of protection of society and national security. It was not apparent that this assessment was reached arbitrarily. In this respect, the Committee found that the author had failed to substantiate his claim for purposes of admissibility and that this part of the communication was inadmissible under article 2 of the Optional Protocol.

7.5 Concerning the claim under article 12, the Committee noted the State party's contention that no substantiation in support of this claim had been adduced, as well as counsel's contention that article 12, paragraph 4, was applicable to Mr. Stewart's case. The Committee noted that the determination of whether article 12, paragraph 4, was applicable to the author's situation required a careful analysis of whether Canada could be regarded as the author's "country" within the meaning of article 12, and, if so, whether the author's deportation to the United Kingdom would bar him from re-entering "his own country", and, in the affirmative, whether this would be done arbitrarily. The Committee considered that there was no a priori indication that the author's situation could not be subsumed under article 12, paragraph 4, and therefore concluded that this issue should be considered on its merits.

7.6 As to the claims under articles 17 and 23 of the Covenant, the Committee observed that the issue whether a State was precluded, by reference to articles 17 and 23, from exercising a right to deport an alien otherwise, consistent with article 13 of the Covenant, should be examined on the merits.

7.7 The Committee noted the State party's request for clarification of the criteria that formed the basis of the Special Rapporteur's request for interim protection under rule 86 of the Committee's rules of procedure, as well as the State party's request that the Committee withdraw its request under rule 86. The Committee observed that what may constitute "irreparable damage" to the victim within the meaning of rule 86 cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 where it believes that compensation would be an adequate remedy. Applying these criteria to deportation cases, the Committee would require to know that an author would be able to return, should there be a finding in his favour on the merits.

8. On 18 March 1994 the Committee declared the communication admissible insofar as it might raise issues under article 12, paragraph 4, article 17 and article 23 of the Covenant.

State party's observations and author's comments

9.1 In its submission of 24 February 1995, the State party argues that Mr. Stewart has never acquired an unconditional right to remain in Canada as "his country". Moreover, his deportation will not operate as an absolute bar to his re-entry to Canada. A humanitarian review in the context of a future application to re-enter Canada as an immigrant is a viable administrative procedure that does not entail a reconsideration of the judicial decision of the Immigration Appeal Board.

9.2 Articles 17 and 23 of the Covenant cannot be interpreted as being incompatible with a State party's right to deport an alien, provided that the conditions of article 13 of the Covenant are observed. Under Canadian law, everyone is protected against arbitrary or unlawful interference with privacy, family and home as required by article 17. The State party submits that when a decision to deport an alien is taken after a full and fair procedure in accordance with law and policy, which are not themselves inconsistent with the Covenant, and in which the demonstrably important and valid interests of the State are balanced with the Covenant rights of the individual, such a decision cannot be found to be arbitrary. In this context the State party submits that the conditions established by law on the continued residency of non-citizens in Canada are reasonable and objective and the application of the law by Canadian authorities is consistent with the provisions of the Covenant, read as a whole.

9.3 The State party points out that the proposed deportation of Mr. Stewart is not the result of a summary decision by Canadian authorities, but rather of careful deliberation of all factors concerned, pursuant to full and fair procedures compatible with article 13 of the Covenant, in which Mr. Stewart was represented by counsel and submitted extensive argument in support of his claim that deportation would unduly interfere with his privacy and family life. The competent Canadian tribunals considered Mr. Stewart's interests and weighed them against the State's interest in protecting the public. In this context, the

State party refers to the Convention relating to the Status of Refugees, which gives explicit recognition to the protection of the public against criminals and those who are security risks; it is submitted that these considerations are equally relevant in interpreting the Covenant. Moreover, Canada refers to the Committee's General Comment No. 15 on "The position of aliens under the Covenant", which provides that "It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law". It also refers to the Committee's Views in Communication No. 58/1979, Maroufidou v. Sweden, in which the Committee held that the deportation of Ms. Maroufidou did not entail a violation of the Covenant, because she was expelled in accordance with the procedure laid down by the State's domestic law and there had been no evidence of bad faith or abuse of power. The Committee held that in such circumstances, it was not within its competence to re-evaluate the evidence or to examine whether the competent authorities of the State had correctly interpreted and applied its law, unless it was manifest that they had acted in bad faith or had abused their power. In this communication there has been no suggestion of bad faith or abuse of power. It is therefore submitted that the Committee should not substitute its own findings without some objective reason to think that the findings of fact and credibility by Canadian decision makers were flawed by bias, bad faith or other factors which might justify the Committee's intervention in matters that are within the purview of domestic tribunals.

9.4 As to Canada's obligation under article 23 of the Covenant to protect the family, reference is made to relevant legislation and practice, including the Canadian Constitution and the Canadian Charter on Human Rights. Canadian law provides protection for the family which is compatible with the requirements of article 23. The protection required by article 23, paragraph 1, however, is not absolute. In considering his removal, the competent Canadian courts gave appropriate weight to the impact of deportation on his family in balancing these against the legitimate State interests to protect society and to regulate immigration. In this context the State party submits that the specific facts particular to his case, including his age and lack of dependents, suggest that the nature and quality of his family relationships could be adequately maintained through correspondence, telephone calls and visits to Canada, which he would be at liberty to make pursuant to Canadian immigration laws.

9.5 The State party concludes that deportation would not entail a violation by Canada of any of Mr. Stewart's rights under the Covenant.

10.1 In her submission dated 16 June 1995, counsel for Mr. Stewart argues that by virtue of his long residence in Canada, Mr. Stewart is entitled to consider Canada to be "his own country" for purposes of article 12, paragraph 4, of the Covenant. It is argued that this provision should not be subject to any restrictions and that the denial of entry to a person in Mr. Stewart's case would be tantamount to exile. Counsel reviews and criticizes relevant Canadian case law, including the 1992 judgement in Chiarelli v. M.E.I., in which the loss of permanent residence was likened to a breach of contract; once the contract is breached, removal can be effected. Counsel maintains that permanent residence in a country and family ties should not be dealt with as in the context of commercial law.

10.2 As to Mr. Stewart's ability to return to Canada following deportation, author's counsel points out that because of his criminal record, he would face serious obstacles in gaining readmission to Canada as a permanent resident and would have to meet the selection standards for admission to qualify as an independent immigrant, taking into account his occupational skills, education and experience. As to the immigration regulations, he would require a pardon from his prior criminal convictions, otherwise he would be barred from readmission as a permanent resident.

10.3 With regard to persons seeking permanent resident status in Canada, counsel refers to decisions of the Canadian immigration authorities that have allegedly not given sufficient weight to extenuating circumstances. Counsel further complains that the exercise of discretion by judges is not subject to review on appeal.

10.4 As to a violation of articles 17 and 23 of the Covenant, author's counsel points out that family, privacy and home are not concepts incorporated into the provisions of the Immigration Act. Therefore, although the immigration authorities can take into account family and other factors, they are not obliged by law to do so. Moreover, considerations of dependency have been limited to the aspect of financial dependency, as illustrated in decisions in the Langner v. M.E.I., Toth v. M.E.I. and Robinson v. M.E.I. cases.

10.5 It is argued that the Canadian authorities did not sufficiently take into account Mr. Stewart's family situation in their decisions. In particular, counsel objects to the evaluation by Canadian courts that Mr. Stewart's family bonds were tenuous, and refers to the unofficial transcript of the deportation hearings, in which Mr. Stewart stressed the emotionally supportive relationship that he had with his mother and brother. Mr. Stewart's mother confirmed that he helped her in caring for her youngest son. Counsel further criticizes the reasoning of the Immigration Appeal Division in the Stewart decision, which allegedly put too much emphasis on financial dependency: "The appellant has a good relationship with his mother who has written in support of him. But the appellant's mother has always lived independently of him and has never been supported by him. The appellant's younger brother is in a program for the disabled and is therefore taken care of by social services. As a matter of fact, there is no one depending on the appellant for sustenance and support ...". Counsel argues that emphasis on the financial aspect of the relationship does not take into account the emotional family bond and submits in support of her argument the report of Dr. Irwin Silverman, a psychologist, summarizing the complexity of human relationships. Moreover counsel cites from a book by Jonathan Bloom-Fesbach, The Psychology of Separation and Loss, outlining the long-term effects of breaking the family bond.

10.6 Counsel rejects the State party's argument that proper balancing has taken place between State interests and individual human rights.

Issues and proceedings before the Committee

11.1 This communication was declared admissible insofar as it might raise issues under article 12, paragraph 4, and articles 17 and 23 of the Covenant.

11.2 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

12.1 The question to be decided in this case is whether the expulsion of Mr. Stewart violates the obligations Canada has assumed under article 12, paragraph 4, and articles 17 and 23 of the Covenant.

12.2 Article 12, paragraph 4, of the Covenant provides: "No one shall be arbitrarily deprived of the right to enter his own country." This article does not refer directly to expulsion or deportation of a person. It may, of course, be argued that the duty of a State party to refrain from deporting persons is a direct function of this provision and that a State party that is under an obligation to allow entry of a person is also prohibited from deporting that person. Given its conclusion regarding article 12, paragraph 4, that will be explained below, the Committee does not have to rule on that argument in the present case. It will merely assume that if article 12, paragraph 4, were to apply to the author, the State party would be precluded from deporting him.

12.3 It must now be asked whether Canada qualifies as being "Mr. Stewart's country". In interpreting article 12, paragraph 4, it is important to note that the scope of the phrase "his own country" is broader than the concept "country of his nationality", which it embraces and which some regional human rights treaties use in guaranteeing the right to enter a country. Moreover, in seeking to understand the meaning of article 12, paragraph 4, account must also be had of the language of article 13 of the Covenant. That provision speaks of "an alien lawfully in the territory of a State party" in limiting the rights of States to expel an individual categorized as an "alien". It would thus appear that "his own country" as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not "aliens" within the meaning of article 13, although they may be considered as aliens for other purposes.

12.4 What is less clear is who, in addition to nationals, is protected by the provisions of article 12, paragraph 4. Since the concept "his own country" is not limited to nationality in a formal sense, that is, nationality acquired on birth or by conferral, it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. In short, while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13. The language of article 12, paragraph 4, permits a broader interpretation, moreover, that might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.

12.5 The question in the present case is whether a person who enters a given State under that State's immigration laws and subject to the conditions of those laws can regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants. But when, as in the present case, the country of immigration facilitates acquiring its nationality and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become "his own country" within the meaning of article 12, paragraph 4, of the Covenant. In this regard it is to be noted that while in the drafting of article 12, paragraph 4, of the Covenant the term "country of nationality" was rejected, so was the suggestion to refer to the country of one's permanent home.

12.6 Mr. Stewart is a British national both by birth and by virtue of the nationality of his parents. While he has lived in Canada for most of his life, he never applied for Canadian nationality. It is true that his criminal record might have kept him from acquiring Canadian nationality by the time he was old enough to do so on his own. The fact is, however, that he never attempted to acquire such nationality. Furthermore, even had he applied and been denied nationality because of his criminal record, this disability was of his own making. It cannot be said that Canada's immigration legislation is arbitrary or unreasonable in denying Canadian nationality to individuals who have criminal records.

12.7 This case would not raise the obvious human problems Mr. Stewart's deportation from Canada presents were it not for the fact that he was not deported much earlier. Were the Committee to rely on this argument to prevent Canada from now deporting him, it would establish a principle that might adversely affect immigrants all over the world whose first brush with the law would trigger their deportation lest their continued residence in the country convert them into individuals entitled to the protection of article 12, paragraph 4.

12.8 Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect that such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have every right to do so, but must also bear the consequences. The fact that Mr. Stewart's criminal record disqualified him from becoming a Canadian national cannot confer on him greater rights than would be enjoyed by any other alien who, for whatever reasons, opted not to become a Canadian national. Individuals in these situations must be distinguished from the categories of persons described in paragraph 12.4 above.

12.9 The Committee concludes that as Canada cannot be regarded as Mr. Stewart's "country", for the purposes of article 12, paragraph 4, of the Covenant, there could not have been a violation of that article by the State party.

12.10 The deportation of Mr. Stewart will undoubtedly interfere with his family relations in Canada. The question is, however, whether the said interference can be considered either unlawful or arbitrary. Canada's Immigration Law expressly provides that the permanent residency status of a non-national may be revoked and that that person may then be expelled from Canada if he or she is convicted of serious offences. In the appeal process the Immigration Appeal Division is empowered to revoke the deportation order "having regard to all the circumstances of the case". In the deportation proceedings in the present case, Mr. Stewart was given ample opportunity to present evidence of his family connections to the Immigration Appeal Division. In its reasoned decision the Immigration Appeal Division considered the evidence presented but it came to the conclusion that Mr. Stewart's family connections in Canada did not justify revoking the deportation order. The Committee is of the opinion that the interference with Mr. Stewart's family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee's family connections. There is therefore no violation of articles 17 and 23 of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee do not disclose a violation of any of the provisions of the International Covenant on Civil and Political Rights.

APPENDIX

A. Individual opinion by Eckart Klein (*concurring*)

[Original: English]

Being in full agreement with the finding of the Committee that the facts of the case disclose neither a violation of article 12, paragraph 4, nor of articles 17 and 23 of the Covenant, for the reasons given in the view, I cannot accept the way how the relationship between article 12, paragraph 4, and article 13 has been determined. Although this issue is not decisive for the outcome of the present case, it could become relevant for the consideration of other communications, and I therefore feel obliged to clarify this point.

The view suggests that there is a category of persons who are not "nationals in the formal sense", but are also not "aliens within the meaning of article 13" (para. 12.4). While I clearly accept that the scope of article 12, paragraph 4, is not entirely restricted to nationals but may embrace other persons as pointed out in the view, I nevertheless think that this category of persons - not being nationals, but still covered by article 12, paragraph 4 - may be deemed to be "aliens" in the sense of article 13. I do not believe that article 13 deals only with some aliens. The wording of the article is clear and provides for no exceptions, and aliens are all non-nationals. The relationship between article 12, paragraph 4, and article 13 is not exclusive. Both provisions may come into play together.

I therefore hold that article 13 applies in all cases where an alien is to be expelled. Article 13 deals with the procedure of expelling aliens, while article 12, paragraph 4, and, under certain circumstances, also other provisions of the Covenant may bar deportation for substantive reasons. Thus, article 12, paragraph 4, may apply even though it concerns a person who is an "alien".

B. Individual opinion by Laurel B. Francis (*concurring*)

[Original: English]

This opinion is given against the background of my recorded views during the Committee's preliminary consideration of this case quite early in the session when I stated, inter alia, that: (a) Mr. Stewart was an "own country" resident under article 12 of the Covenant and (b) his expulsion under article 13 was not in violation of article 12, paragraph 4.

I will as far as possible avoid a discursive format in relation to the Committee's decision adopted on 1 November with respect to the question whether the expulsion of Mr. Stewart from Canada (under article 13 of the Covenant) violates the State party's obligation under article 12, paragraph 4, and articles 17 and 23 of the Covenant.

I should like to submit that:

1. Firstly, I concur with the reasons given by the Committee in paragraph 12.10 and the decision taken that there was no violation of articles 17 and 23 of the Covenant.

2. But, secondly, I do not agree with the Committee's restricted application of his "own country" concept at the fourth sentence of

paragraph 12.3 of the Committee's decision under reference (That provision speaks of an "alien lawfully in the territory of a State party" in limiting the rights of States to expel an individual categorized as an "alien".) Does it preclude the expulsion of unlawful aliens? Of course not - falling as they do under another legal regime. I have made this point in order to suggest that the legal significance in relation to "an alien lawfully in the territory of a State party" as appears in the first line of article 13 of the Covenant, is related to the first line of article 12: "everyone lawfully in the territory of a State", which includes aliens, but it may be borne in mind that, in respect of a compatriot of Mr. Stewart lawfully in Canada on a visitor's visa (not being a permanent resident of Canada), he would not normally have acquired "own country" status as Mr. Stewart had and would be indifferent to the application of article 12, paragraph 4. But Mr. Stewart would certainly be concerned as indeed he has been.

3. Thirdly, were it intended to restrict the application of article 13 to exclude aliens lawfully in the territory of a State party who had acquired "own country" status, such exclusion would have been specifically provided in article 13 itself and not left to the interpretation of the scope of article 12, paragraph 4, which incontestably applies to nationals and other persons contemplated in the Committee's text.

4. In regard to "own country" status in its submission of 24 February 1995, the State party argues that "Mr. Stewart has never acquired an unconditional[9] right to remain in Canada as his 'own country'. Moreover his deportation will not operate as an absolute bar to his re-entry to Canada. A humanitarian review in the context of the future application to re-enter Canada as an immigrant is a viable administrative procedure that does not entail reconsideration of the judicial decision of the Immigration Appeal Board" (see 9.1).[10]

Implicit in the foregoing is the admission that the State party recognizes Mr. Stewart's status as a permanent resident in Canada as his "own country". It is that qualified right applicable to such status which facilitated the decision to expel Mr. Stewart.

But for the foregoing statement attributable to the State party, we could have concluded that the decision taken to expel Mr. Stewart terminated his "own country" status in regard to Canada, but, in the light of such a statement, the "own country" status remains only suspended at the pleasure of the State party.

On the basis of the foregoing analysis, I am unable to support the decision of the Committee that Mr. Stewart had at no time acquired "own country" status in Canada.

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[9] Emphasis mine (see 9.1).

[10] See also statements in paragraph 4.2 attributable to the State party, including the following: "... furthermore, he would not be barred once and for all from readmission to Canada".

C. Individual opinion by Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco José Aguilar Urbina (*dissenting*)

[Original: English]

1. We are unable to agree with the Committee's conclusion that the author cannot claim the protection of article 12, paragraph 4.

2. A preliminary issue is whether the arbitrary deportation of a person from his/her own country should be equated with arbitrary deprivation of the right to enter that country, in circumstances where there has as yet been no attempt to enter or re-enter the country. The Committee does not reach a conclusion on this issue; it merely assumes that if article 12, paragraph 4, were to apply to the author, the State would be precluded from deporting him (para. 12.2). The effect of the various proceedings taken by Canada, and the orders made, is that the author's right of residence has been taken away and his deportation ordered. He can no longer enter Canada as of right, and the prospects of his ever being able to secure permission to enter for more than a short period, if at all, seem remote. In our view, the right to enter a country is as much a prospective as a present right, and the deprivation of that right can occur, as in the circumstances of this case, whether or not there has been any actual refusal of entry. If a State party is under an obligation to allow entry of a person it is prohibited from deporting that person. In our opinion the author has been deprived of the right to enter Canada, whether he remains in Canada awaiting deportation or whether he has already been deported.

3. The author's communication under article 13 was found inadmissible, and no issue arises for consideration under that provision. The Committee's view is, however, that article 12, paragraph 4, applies only to persons who are nationals, or who, while not nationals in a formal sense are also not aliens within the meaning of article 13 (para. 12.3). Two consequences appear to follow from this view. The first one is that the relationship between an individual and a State may be not only that of national or alien (including stateless), but may also fall into a further, undefined, category. We do not think this is supported either by article 12 of the Covenant or by general international law. As a consequence of the Committee's view, it would also appear to follow that a person could not claim the protection of both articles 13 and 12, paragraph 4. We do not agree. In our view article 13 provides a minimum level of protection in respect of expulsion for any alien, that is any non-national, lawfully in a State. Furthermore, there is nothing in the language of article 13 which suggests that it is intended to be the exclusive source of rights for aliens, or that an alien who is lawfully within the territory of a State may not also claim the protection of article 12, paragraph 4, if he or she can establish that it is his/her own country. Each provision should be given its full meaning.

4. The Committee attempts to identify the further category of individuals who could make use of article 12, paragraph 4, by stating that a person cannot claim that a State is his or her own country, within the meaning of article 12, paragraph 4, unless that person is a national of that State, or has been stripped of his or her nationality, or denied nationality by that State in the circumstances described (para. 12.4). The Committee is also of the view that unless unreasonable impediments have been placed in the way of an immigrant acquiring nationality, a person who enters a given State under its immigration laws, and who had the opportunity to acquire its nationality, cannot regard that State as his own country when he has failed to acquire its nationality (para. 12.5).

5. In our opinion, the Committee has taken too narrow a view of article 12, paragraph 4, and has not considered the raison d'être of its formulation. Individuals cannot be deprived of the right to enter "their own country" because it is deemed unacceptable to deprive any person of close contact with his family or his friends or, put in general terms, with the web of relationships that form his or her social environment. This is the reason why this right is set forth in article 12, which addresses individuals lawfully within the territory of a State, not those who have formal links to that State. For the rights set forth in article 12, the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it. This is what article 12, paragraph 4, protects.

6. The object and purpose of the right set forth in article 12, paragraph 4, are reaffirmed by its wording. Nothing in it or in article 12 generally suggests that its application should be restricted in the manner suggested by the Committee. While a person's "own country" would certainly include the country of nationality, there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. After all, a person may have several nationalities, and yet have only the slightest or no actual connections of home and family with one or more of the States in question. The words "his own country" on the face of it invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain (as well as to the absence of such ties elsewhere). Where a person is not a citizen of the country in question, the connections would need to be strong to support a finding that it is his "own country". Nevertheless our view is that it is open to an alien to show that there are such well established links with a State that he or she is entitled to claim the protection of article 12, paragraph 4.

7. The circumstances relied on by the author to establish that Canada is his own country are that he had lived in Canada for over 30 years, was brought up in Canada from the age of seven, had married and divorced there. His children, mother, handicapped brother continue to reside there. He had no ties with any other country, other than that he was a citizen of the United Kingdom; his elder brother had been deported to the United Kingdom some years before. The circumstances of his offences are set out in paragraph 2.2; as a result of these offences it is not clear if the author was ever entitled to apply for citizenship. Underlying the connections mentioned is the fact that the author and his family were accepted by Canada as immigrants when he was a child and that he became in practical terms a member of the Canadian community. He knows no other country. In all the circumstances, our view is that the author has established that Canada is his own country.

8. Was the deprivation of the author's right to enter Canada arbitrary? In another context, the Committee has taken the view that "arbitrary" means unreasonable in the particular circumstances, or contrary to the aims and objectives of the Covenant (General Comment on article 17). That approach also appears to be appropriate in the context of article 12, paragraph 4. In the case of citizens, there are likely to be few if any situations when deportation would not be considered arbitrary in the sense outlined. In the case of an alien such as the author, deportation could be considered arbitrary if the grounds relied on to deprive him of his right to enter and remain in the country were, in the circumstances, unreasonable, when weighed against the circumstances which make that country his "own country".

9. The grounds relied on by the State party to justify the expulsion of the author are his criminal activities. It must be doubted whether the commission of criminal offences alone could justify the expulsion of a person from his own country, unless the State could show that there are compelling reasons of national security or public order which require such a course. The nature of the offences committed by the author do not lead readily to that conclusion. In any event, Canada can hardly claim that these grounds were compelling in the case of the author when it has in another context argued that the author might well be granted an entry visa for a short period to enable him to visit his family. Furthermore, while the deportation proceedings were not unfair in procedural terms, the issue which arose for determination in those proceedings was whether the author could show reasons against his deportation, not whether there were grounds for taking away his right to enter "his own country". The onus was put on the author rather than on the State. In these circumstances, we conclude that the decision to deport the author was arbitrary, and thus a violation of his rights under article 12, paragraph 4.

10. We agree with the Committee that the deportation of the author will undoubtedly interfere with his family relations in Canada (para. 12.10), but we cannot agree that this interference is not arbitrary, since we have come to the conclusion that the decision to deport the author - which is the cause of the interference with the family - was arbitrary. We have to conclude, therefore, that Canada has also violated the author's rights under articles 17 and 23.

D. Individual opinion by Christine Chanet, co-signed by Julio Prado Vallejo (*dissenting*)

[Original: French]

I do not share the Committee's position with regard to the Stewart case, in paragraph 12.9, in which it concludes that, "as Canada cannot be regarded as Mr. Stewart's 'own country'", there has been no violation by Canada of article 12, paragraph 4, of the Covenant.

My criticism concerns the approach taken to the case on this point:

- Assuming that wrongful acts disqualified the author from acquiring nationality and that, as a consequence, Canada may consider that it is not his own country, that conclusion should have led the Committee to reject the communication at the admissibility stage, since its awareness of that impediment should have precluded any application of article 12, paragraph 4, of the Covenant.

- There is nothing either in the Covenant itself or in the travaux préparatoires about the "own country" concept; the Committee must, therefore, either decide the question on a case-by-case basis or establish criteria and make them known to States and authors, thus avoiding any contradiction with admissibility decisions; if a person is unable to acquire the nationality of a country owing to legal impediments, then, regardless of any other criteria or factual circumstances, the communication should not be declared admissible under article 12, paragraph 4, of the Covenant.

I agree with the substance of the individual opinion formulated by Ms. Evatt and Ms. Medina Quiroga.

E. Individual opinion by Prafullachandra Bhagwati (*dissenting*)

[Original: English]

I entirely agree with the separate opinion prepared by Mrs. Elizabeth Evatt and Mrs. Cecilia Medina Quiroga, but having regard to the importance of the issues involved in the case, I am writing a separate opinion. This separate opinion may be read as supplementary to the opinion of Mrs. Evatt and Mrs. Medina Quiroga with which I find myself wholly in agreement.

This is not a case of one single individual. Its decision will have an impact on the lives of tens of thousands of immigrants and refugees. This case has therefore caused me immense anxiety. If the view taken by the majority of the Committee is right, people who have forged close links with a country not only through long residence but having regard to various other factors, who have adopted a country as their own, who have come to regard a country as their home country, would be left without any protection. The question is: are we going to read human rights in a generous and purposive manner or in a narrow and constricted manner? Let us not forget that basically, human rights in the International Covenant are rights of the individual against the State; they are protections against the State and they must therefore be construed broadly and liberally. This backdrop must be kept in mind when we are interpreting article 12, paragraph 4.

First let me dispose of the argument with regard to article 13. The Committee has declared the communication under article 13 inadmissible and therefore it does not call for consideration. Coming to article 12, paragraph 4, it raises three issues. The first is whether article 12, paragraph 4, covers a case of deportation or whether it is confined only to right of entry; the second is as to what is the meaning and connotation of the words "his own country" and whether Canada could be said to be the author's own country; and the third is what are the criteria for determining whether an action alleged to be violative of article 12, paragraph 4, is arbitrary and whether the action of Canada in deporting the author was arbitrary. I may point out at the outset that if the action of Canada was, on the facts, not arbitrary, there would be no violation of article 12, paragraph 4, even if the other two elements were satisfied, namely, that article 12, paragraph 4, covers deportation and Canada was the author's own country within the meaning of article 12, paragraph 4, and it would, in that event, not be necessary to consider whether or not these two elements were satisfied. But since the majority of the members of the Committee have rested their opinion on the interpretation of the words "his own country" and taken the view, in my opinion wrongly, that Canada could not be said to be the author's own country, I think it necessary to consider all the three elements of article 12, paragraph 4.

I am of the view that on a proper interpretation, article 12, paragraph 4, protects everyone against arbitrary deportation from his own country. There are two reasons in support of this view. In the first place, unless article 12, paragraph 4, is read as covering a case of deportation, a national of a State would have no protection against expulsion or deportation under the Covenant. Suppose the domestic law of a State empowers the State to expel or deport a national for certain specific reasons which may be totally irrelevant, fanciful or whimsical. Can it be suggested for a moment that the Covenant does not provide protection to a national against expulsion or deportation under such domestic law? The only article of the Covenant in which this protection can be found is article 12, paragraph 4. It may be that under international law, a national cannot be expelled from his country of nationality. I am not familiar with all aspects of international law and I am therefore not in a position to affirm or disaffirm this proposition. But, be as it may, a law can be made by a State providing for expulsion of a national. It may conflict with a principle of international law, but that would not invalidate the domestic law. The principle of international law would not afford protection to the person concerned against domestic law. The only protection such a person would have is under article 12, paragraph 4. We should not read article 12, paragraph 4, in a manner which would leave a national unprotected against expulsion under domestic law. In fact, there are countries where there is domestic law providing for expulsion even of nationals and article 12, paragraph 4, properly read, provides protection against arbitrary expulsion of a national. The same reasoning would apply also in a case where a non-national is involved. Article 12, paragraph 4, must therefore be read as covering expulsion or deportation.

Moreover, it is obvious that if a person has a right to enter his own country and he/she cannot be arbitrarily prevented from entering his/her own country, but he/she can be arbitrarily expelled, it would make nonsense of article 12, paragraph 4. Suppose a person is expelled from his own country arbitrarily because he/she has no protection under article 12, paragraph 4, and immediately after expulsion, he/she seeks to enter the country. Obviously he/she cannot be prevented because article 12, paragraph 4, protects his/her entry. Then what is the sense of expelling him? We must therefore read article 12, paragraph 4, as embodying, by necessary implication, protection against arbitrary expulsion from one's own country.

That takes me to the second issue. What is the scope and ambit of "his own country"? There is a general acceptance that "his own country" cannot be equated with "country of nationality" and I will not therefore spend any time on it. It is obvious that the expression "his own country" is wider than "country of nationality" and that is conceded by the majority view. "His own country" includes "country of nationality and something more". What is that "something more"? The majority view accepts that the concept "his own country" embraces, at the very least, "an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien". I am in full agreement with this view. But then, the majority proceeds to delimit this concept by confining it to the following three illustrative cases:

(1) Where nationals of a country have been stripped of their nationality in violation of international law;

(2) Where the country of nationality of individuals has been incorporated into or transferred to another national entity whose nationality is being denied to them; and

(3) Stateless persons arbitrarily deprived of their right to acquire the nationality of the country of their residence.

It is the view of the majority that "while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13" and they fall within article 12, paragraph 4.

There are two observations I would like to make in connection with this view of the majority. The majority view argues that article 12, paragraph 4, and 13 are mutually exclusive. It is observed by the majority in the view of the Committee that "'his own country' as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not 'aliens' within the meaning of article 13, though they may be considered as aliens for other purposes". Thus, according to the majority view, an individual falling within article 12, paragraph 4, would not be an "alien" within the meaning of article 13. I too subscribe to the same view. But there my agreement with the view of the majority ends. The question is: who is protected by article 12, paragraph 4? Who falls within its protective wing? I may again repeat, in agreement with the majority view, that article 12, paragraph 4, embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be an alien. This is a correct test but I fail to understand why its application should be limited to the three kinds of cases referred to by the majority. These three kinds of cases would certainly be covered by this test but there may be many more which would also answer this test. I do not see any valid reason why they should be excluded except a predetermination by the majority that they should not be regarded as fulfilling this test, because that would affect the immigration policies of the developed countries. Take for example, a large number of Africans or Latin Americans or Indians who are settled in the United Kingdom, but who have not acquired British citizenship. Their children, born and brought up in the United Kingdom, would not have even visited their country of nationality. If you ask them: "which is your own country?", they would unhesitatingly say: "the United Kingdom". Can you say that only India or some country in Africa or Latin America which they have never visited and with which they have no links at all is the only country which they can call their own country? I agree that mere length of residence would not be a determinative test, but length of residence may be a factor coupled with other factors. The totality of factors would have to be taken into account for the purpose of determining whether the country in question is a country which the person concerned has adopted as his own country or is a country with which he has special ties or the most intimate connection or link in order to be regarded as "his own country" within the meaning of article 12, paragraph 4.

Before I part with the discussion of this point, I must refer to one other illogicality in which the majority appears to have fallen. The majority seems to suggest that where the country of immigration places unreasonable impediments on the acquiring of nationality by a new immigrant, it might be possible to say that for the new immigrant who has not acquired the nationality of the country of immigration and continues to retain the nationality of his country of origin, the country of immigration may be regarded as "his own country". There are at least two objections against the validity of this view. In the first place, it is the sovereign right of a State to determine under what conditions it will grant nationality to a non-national. It is not for the Committee to pass judgement whether the conditions are reasonable or not and whether the conditions are such as to impose unreasonable impediments on the acquisition of nationality by a new immigrant nor is the Committee competent to enquire whether the action of the State in rejecting the application of a new immigrant for nationality is reasonable or not. Secondly, I fail to see what is the difference between the two situations: one, where an application for nationality is made and is unreasonably refused and the other, where an application for nationality is not made at all. In both cases, the new immigrant would continue to be a non-national and if, in one case, special ties or intimate connection or link with the country of immigration would render such country "his own country", there is no logical or relevant reason why it should not have the same consequence or effect in the other case.

I fail to understand what is the basis on which the majority states that countries like Canada have a right to expect that immigrants within due course acquire all the rights and assume all the obligations that nationality entails. I agree that individuals who do not take advantage of the opportunity to apply for nationality must bear the consequences of not being nationals. But the question is: what are these consequences? Do they entail exclusion from the benefit of article 12, paragraph 4? That is the question which has to be answered and it cannot be assumed, as the majority seems to have done, that the consequence is exclusion from the benefit of article 12, paragraph 4. Throughout the decision of the Committee, I find that the majority starts with the predetermination that in the case of the author, Canada cannot be regarded as "his own country", even though he has special ties and most intimate connection and link with Canada and has always regarded Canada as his own country, and then tries to justify this conclusion by holding that there were no unreasonable impediments in the way of the author acquiring Canadian nationality but the author did not take advantage of the opportunity to apply for Canadian nationality and must therefore bear the consequence of Canada not being regarded as his own country and therefore of being deprived of the benefit of article 12, paragraph 4. If I may repeat, the fact that the author did not apply for Canadian nationality in a situation where there were no unreasonable impediments in such acquisition cannot have any bearing on the question whether Canada could or could not be regarded as "his own country". It is because the author is not a Canadian national that the question has arisen and it is begging the question to say that Canada could not be regarded as "his own country" because he did not or could not acquire Canadian nationality.

It is undoubtedly true that on this view, both the United Kingdom and Canada would be "his own country" for the author. One would be the country of nationality while the other would be, what I may call, the country of adoption. It is quite conceivable that an individual may have two countries which he can call his own: one may be a country of his nationality and the other, a country adopted by him as his own country. I am therefore inclined to take the view, on the facts as set out in the communication, that Canada was the author's own country within the meaning of article 12, paragraph 4, and he could not be arbitrarily expelled or deported from Canada by the Government of Canada.

That leaves the question whether the expulsion or deportation of the author could be said to be arbitrary. On this question, I recall the Committee's jurisprudence that the concept of arbitrariness must not be confined to procedural arbitrariness but must include substantive arbitrariness as well and it must not be equated with "against the law" but must be interpreted broadly to include such elements as inappropriateness or excessiveness or disproportionateness. Where an action taken by the State party against a person is excessive or disproportionate to the harm sought to be prevented, it would be unreasonable and arbitrary. Here, in the present case, the author is sought to be expelled on account of his recidivist tendency. He has committed around 40 offences, including theft and robbery, for which he has been punished. The question is whether it is necessary, in all the circumstances of the case, to expel or deport him in order to protect the society from his criminal propensity or whether this object can be achieved by taking a lesser action than expulsion or deportation. The element of proportionality must be taken into account. I think that if this test is applied, the action of Canada in seeking to expel or deport the author would appear to be arbitrary, particularly in the light of the fact that the author has succeeded in controlling alcohol abuse and no offence appears to have been committed by him since May 1991. If the author commits any more offences, he can be adequately punished and imprisoned and if, having regard to his past criminal record, a sufficiently heavy sentence of imprisonment is passed against him, it would act as a deterrent against any further criminal activity on his part and in any event, he would be put out of action during the time that he is in prison. This is the kind of action which would be taken against a national in order to protect the society and qua a national, it would be regarded as adequate. I do not see why it should not be regarded as adequate qua a person who is not a national but who has adopted Canada as his own country or come to regard Canada as his own country. I am of the view that the action of expulsion or deportation of the author from Canada resulting in completely uprooting him from his home, family and moorings, would be excessive and disproportionate to the harm sought to be prevented and hence must be regarded as arbitrary.

I would therefore hold that in the present case there is violation of article 12, paragraph 4, of the Covenant. On this view, it becomes unnecessary to consider whether there is also violation of articles 17 and 23 of the Covenant.

H Communication No. 549/1993; Francis Hopu and Tepoaitu Bessert v. France (Views adopted on 29 July 1997, sixtieth session)[*]

Submitted by:	Francis Hopu and Tepoaitu Bessert [represented by Mr. François Roux, lawyer in France]
Victims:	The authors
State party:	France
Date of communication:	4 June 1993 (initial submission)
Date of decision on admissibility:	30 June 1994
Date of decision to amend decision on admissibility:	30 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1997,

Having concluded its consideration of Communication No. 549/1993 submitted to the Human Rights Committee on behalf of Messrs. Francis Hopu and Tepoaitu Bessert under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[**] [***]

1. The authors of the communication are Francis Hopu and Tepoaitu Bessert, both ethnic Polynesians and inhabitants of Tahiti, French Polynesia. They claim to be victims of violations by France of article 2, paragraph 1 and subparagraph 3 (a), articles 14 and 17, paragraph 1, article 23, paragraph 1, and article 27 of the International Covenant on Civil and Political Rights. They are represented by Mr. François Roux, who has provided a duly signed power of attorney.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[**] Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the case.

[***] The texts of two individual opinions signed by nine Committee members are appended to the present document.

Facts as submitted by the authors

2.1 The authors are the descendants of the owners of a land tract (approximately 4.5 hectares) called Tetaitapu, in Nuuroa, on the island of Tahiti. They argue that their ancestors were dispossessed of their property by jugement de licitation of the Tribunal civil d'instance of Papeete on 6 October 1961. Under the terms of the judgement, ownership of the land was awarded to the Société hôtelière du Pacifique sud (SHPS). Since the year 1988, the Territory of Polynesia has been the sole shareholder of this company.

2.2 In 1990, the SHPS leased the land to the Société d'étude et de promotion hôtelière, which in turn subleased it to the Société hôtelière RIVNAC. RIVNAC seeks to begin construction work on a luxury hotel complex on the site, which borders a lagoon, as soon as possible. Some preliminary work - such as the felling of some trees, cleaning the site of shrubs, fencing off of the ground - has been carried out.

2.3 The authors and other descendants of the owners of the land peacefully occupied the site in July 1992, in protest against the planned construction of the hotel complex. They contend that the land and the lagoon bordering it represent an important place in their history, their culture and their life. They add that the land encompasses the site of a pre-European burial ground and that the lagoon remains a traditional fishing ground and provides the means of subsistence for some 30 families living next to the lagoon.

2.4 On 30 July 1992, RIVNAC seized the Tribunal de première instance of Papeete with a request for an interim injunction; this request was granted on the same day, when the authors and occupants of the site were ordered to leave the ground immediately and to pay 30,000 FPC (Francs Pacifique) to RIVNAC. On 29 April 1993, the Court of Appeal of Papeete confirmed the injunction and reiterated that the occupants had to leave the site immediately. The authors were notified of the possibility to appeal to the Court of Cassation within one month of the notification of the order. Apparently, they have not done so.

2.5 The authors contend that the pursuit of the construction work would destroy their traditional burial ground and ruinously affect their fishing activities. They add that their expulsion from the land is now imminent and that the High Commissioner of the Republic, who represents France in Polynesia, will soon resort to police force to evacuate the land and to make the start of the construction work possible. In this context, the authors note that the local press reported that up to 350 police officers (including CRS - Corps républicain de sécurité) have been flown into Tahiti for that purpose. The authors therefore ask the Committee to request interim measures of protection, pursuant to rule 86 of the Committee's rules of procedure.

Complaint

3.1 The authors allege a violation of article 2, subparagraph 3 (a), juncto 14, paragraph 1, on the ground that they have not been able to petition lawfully established courts for an effective remedy. In this connection, they note that land claims and disputes in Tahiti were traditionally settled by indigenous tribunals ("tribunaux indigènes"), and that the jurisdiction of these tribunals was recognized by France when Tahiti came under French sovereignty in 1880. However, it is submitted that, since 1936, when the so-called High Court of Tahiti ceased to function, the State party has failed to take appropriate measures to keep these indigenous tribunals in operation; as a result, the authors submit, land claims have been haphazardly and unlawfully adjudicated by civil and administrative tribunals.

3.2 The authors further claim a violation of article 17, paragraph 1, and article 23, paragraph 1, on the ground that their forceful removal from the disputed site and the realization of the hotel complex would entail the destruction of the burial ground where members of their family are said to be buried and because such removal would interfere with their private and their family lives.

3.3 The authors claim to be victims of a violation of article 2, paragraph 1. They contend that Polynesians are not protected by laws and regulations (such as articles R 361 (1) and 361 (2) of the Code des Communes, concerning cemeteries, as well as legislation concerning natural sites and archaeological excavations) which have been issued for the territoire métropolitain and which are said to govern the protection of burial grounds. They thus claim to be victims of discrimination.

3.4 Finally, the authors claim a violation of article 27 of the Covenant, since they are denied the right to enjoy their own culture.

Committee's decision on admissibility

4.1 During its fifty-first session, the Committee examined the admissibility of the communication. It noted with regret that the State party had failed to put forth observations in respect of the admissibility of the case, in spite of three reminders addressed to it between October 1993 and May 1994.

4.2 The Committee began by noting that the authors could have appealed the injunction of the Court of Appeal of 29 April 1993 to the Court of Cassation. However, had this appeal been lodged, it would have related to the obligation to vacate the land the authors held occupied and the possibility to oppose construction of the planned hotel complex but not to the issue of ownership of the land. In the latter context, the Committee noted that so-called "indigenous tribunals" would be competent to adjudicate land disputes in Tahiti, pursuant to the decrees of 29 June 1880 ratified by the French Parliament on 30 December 1880. There was no indication that the jurisdiction of these courts had been formally repudiated by the State party; rather, their operation appeared to have fallen into disuse, and the authors' claim to this effect had not been contradicted by the State party. Nor had the authors' contention that land claims in Tahiti are adjudicated "haphazardly" by civil or administrative tribunals been contradicted. In the circumstances, the Committee found that there were no effective domestic remedies for the authors to exhaust.

4.3 In respect of the claim under article 27 of the Covenant, the Committee recalled that France, upon acceding to the Covenant, had declared that "in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable as far as the Republic is concerned". It confirmed its previous jurisprudence that the French "declaration" on article 27 operated as a reservation and, accordingly, concluded that it was not competent to consider complaints directed against France under article 27 of the Covenant.

4.4 The Committee considered the claims made under the other provisions of the Covenant to have been substantiated, for purposes of admissibility, and on 30 June 1994, declared the communication admissible insofar as it appeared to raise issues under article 14, paragraph 1, article 17, paragraph 1, and article 23, paragraph 1, of the Covenant.

State party's request for review of admissibility and information on the merits

5.1 In two submissions under article 4, paragraph 2, of the Optional Protocol dated 7 October 1994 and 3 April 1995, the State party contends that the communication is inadmissible and requests the Committee to review its decision on admissibility, pursuant to rule 93, paragraph 4, of the rules of procedure.

5.2 The State party contends that the authors failed to exhaust domestic remedies considered by the State party to be effective. Thus, concerning the authors' argument that they were illegally dispossessed of the land subleased to RIVNAC and that only indigenous tribunals are competent to hear their complaint, it notes that no French tribunal has at any moment been seized of any of the claims formulated by Messrs. Hopu and Bessert. Thus, they could have, at the time of the sale of the contested grounds and of the proceedings leading to the judgement of the Tribunal of Papeete of 6 October 1961, challenged the legality of the procedure initiated or else the competence of the tribunal. Any decision made on such a challenge would have been susceptible of appeal. However, the judgement of 6 October 1961 was never challenged and therefore has become final.

5.3 Furthermore, at the time of the occupation of the grounds from 1992 to 1993, it was fully open to the authors, according to the State party, to intervene in the proceedings between RIVNAC and the Association "IA ORA O NU'UROA". This procedure, known as "tierce opposition", enables every individual to oppose a judgement which affects/infringes his or her rights, even if he/she is not a party to the proceedings. The procedure of "tierce opposition" is governed by articles 218 et seq. of the Code of Civil Procedure of French Polynesia. The State party notes that the authors could have intervened ("... auraient pu former tierce opposition") both against the decision of the Tribunal of First Instance of Papeete and the judgement of the Court of Appeal of Papeete, by challenging the title of RIVNAC to the contested grounds and by refuting the competence of these courts.

5.4 The State party emphasizes that the competence of a tribunal can always be challenged by a complainant. Article 65 of the Code of Civil Procedure of French Polynesia stipulates that a complainant challenging the jurisdiction of the court must indicate the jurisdiction he considers to be competent ("s'il est prétendu que la juridiction saisie est incompétente ..., la partie qui soulève cette exception doit faire connaître en même temps et à peine d'irrecevabilité devant quelle juridiction elle demande que l'affaire soit portée").

5.5 According to the State party, the authors could equally, in the context of "tierce opposition", have argued that the expulsion from the grounds claimed by RIVNAC constituted a violation of their right to privacy and their right to a family life. The State party recalls that the provisions of the Covenant are directly applicable before French tribunals; articles 17 and 23 could well have been invoked in the present case. In respect of the claims under articles 17 and 23, paragraph 1, therefore, the State party also argues that domestic remedies have not been exhausted.

5.6 Finally, the State party argues that judicial decisions made in the context of "tierce opposition" proceedings can be appealed in the same way as judgements of the same court ("... les jugements rendus sur tierce opposition sont susceptibles des mêmes recours que les décisions de la juridiction dont ils émanent"). If the authors had challenged the judgement of the Court of Appeal of Papeete of 29 April 1993 on the basis of "tierce opposition", any decision adopted in respect of their challenge could have been appealed to the Court of Cassation. In this context, the State party notes that pursuant to article 55 of the French Constitution of 4 June 1958, the Covenant provisions are incorporated into the French legal order and are given priority over simple laws. Before the Court of Cassation, the authors could have raised the same issues they argue before the Human Rights Committee.

5.7 In the State party's opinion, the authors do not qualify as "victims" within the meaning of article 1 of the Protocol. Thus, in respect of their claim under article 14, they have failed to adduce the slightest element of proof of title to the grounds or of a right to occupancy of the grounds. As a result, their expulsion from the grounds cannot be said to have violated any of their rights. According to the State party, similar considerations apply to the claims under article 17 and article 23, paragraph 1. Thus, the authors failed to show that the human remains excavated on the disputed grounds in January 1993 or before were in any way the remains of members of their family or of their ancestors. Rather, forensic tests undertaken by the Polynesian Centre for Human Sciences have revealed that the skeletons are very old and pre-date the arrival of Europeans in Polynesia.

5.8 Finally, the State party contends that the communication is inadmissible ratione materiae and ratione temporis. It considers that the authors' complaint relates in reality to a dispute over property. The right to property not being protected by the Covenant, the case is considered inadmissible under article 3 of the Optional Protocol. Furthermore, the State party observes that the sale of the grounds occupied by the authors was procedurally correct, as decided by the Tribunal of First Instance of Papeete on 6 October 1961. The case thus is based on facts which precede the entry into force both of the Covenant and of the Optional Protocol for France, and therefore considered to be inadmissible ratione temporis.

5.9 Subsidiarily, the State party offers the following comments on the merits of the authors' allegations: on the claim under article 14, the State party recalls that King Pomare V, who, on 29 June 1880, had issued a proclamation concerning the maintenance of indigenous tribunals for land disputes, himself co-signed declarations on 29 December 1887 relating to the abolition of these tribunals. The declarations of 29 December 1887 were in turn ratified by article 1 of the Law of 10 March 1891. Since then, the State party argues, the ordinary tribunals are competent to adjudicate land disputes. Contrary to the authors' allegations, land disputes are given specialized attention by the Tribunal of First Instance of Papeete, where two judges specialized in the adjudication of land disputes each preside over two court sessions reserved for such disputes each month. Furthermore, it is argued that the right of access to a tribunal does not imply a right to unlimited choice of the appropriate judicial forum for the complainant - rather, the right to access to a tribunal must be understood as a right to access to the tribunal competent to adjudicate a given dispute.

5.10 As to the claims under article 17 and article 23, paragraph 1, the State party recalls that not even the authors claim that the skeletons discovered on the disputed grounds belong to their respective families or their relatives, but rather to their "ancestors" in the broadest sense of the term. To subsume the remains from a grave, however old and unidentifiable they are, under the notion of "family", would be an abusively extensive and unpracticable interpretation of the term.

Authors' comments on the State party's submission under article 4, paragraph 2

6.1 In their comments, the authors refute the State party's argument that effective domestic remedies remain available to them. They request that the Committee dismiss the State party's challenge to the admissibility of the communication as belated.

6.2 The authors reiterate that they are not invoking a right to property but the right to access to a tribunal and their right to a private and family life. They therefore reject the State party's argument related to inadmissibility ratione materiae and add that their rights were violated at the time of submission of their communication, i.e. in June 1993, and after the entry into force of the Covenant and the Optional Protocol for France.

6.3 The authors submit that they must be regarded as "victims" within the meaning of article 1 of the Optional Protocol, since they consider that they have the right to be heard before the indigenous tribunal competent for land disputes in French Polynesia, a right denied to them by the State party. They contend that the State party is estopped from criticizing them for not having invoked their right to property or a right to occupancy of the disputed grounds when precisely their access to the indigenous tribunal competent for adjudication of such disputes was impossible. Similarly, they consider themselves to be "victims" in respect of claims under article 17 and article 23, paragraph 1, arguing that it would have been for the courts and not the French Government to prove the existence or absence of family or ancestral links between the human remains discovered on the disputed site, the authors and their families.

6.4 On the requirement of exhaustion of domestic remedies, the authors recall that they were not parties to the procedure between the Société hôtelière RIVNAC and the Association IA ORA O NU'UROA; not being parties to the proceedings, they were not in the position to raise the question of the tribunal's competence. They reiterate that they are faced with a situation in which their claims are not justiciable, given that the French Government has abolished the indigenous tribunals which it had agreed to maintain in the Treaty of 1881. The same argument is said to apply to the possibility of cassation: as the authors were not parties to the procedure before the Court of Appeal of Papeete of 29 April 1993, they could not apply for cassation to the Court of Cassation. Even assuming that they would have had the possibility of appealing to the Court of Cassation, they argue, this would not have been an effective remedy, since that court could only have concluded that the tribunals seized of the land dispute had no competence in the matter.

6.5 The authors reconfirm that only the indigenous tribunals remain competent to adjudicate land disputes in French Polynesia. Rather than refuting this conclusion, the declarations of 29 September 1887 are said to confirm it, since they stipulate that the indigenous tribunals were to be abolished once the disputes for which they had been established had been settled ("Les Tribunaux indigènes, dont le maintien avait été stipulé à l'acte d'annexion de Tahiti à la France, seront supprimés dès que les opérations relatives à la délimitation de la propriété auxquelles elles donnent lieu auront été vidées"). The authors question the validity of the declarations of 29 December 1887 and add that as land disputes continue to exist in Tahiti, a fact conceded by the State party itself (para. 5.9 above), it must be assumed that the indigenous tribunals remain competent to adjudicate them. Only thus can it be explained that the Haute Cour de Tahiti continued to hand down judgements in these disputes until 1934.

Post-admissibility considerations

7.1 During its fifty-fifth session, the Committee further examined the communication and took note of the State party's request that the decision on admissibility be reviewed pursuant to rule 93, paragraph 4, of the rules of procedure. It took note of the State party's argument that the Government had not filed its admissibility observations in time because of the complexity of the case and the short deadlines imparted to the State party; it observed, however, that the Government had not reacted to three reminders and that it had taken the State party 16 months, instead of two, to reply to the admissibility of the authors' claims and that the State party's first submission had been made three months after the adoption of the decision on admissibility. The Committee considered that, as there had been no submissions from the State party by the time of the adoption of the decision on admissibility, it had to rely on the authors' information; furthermore, silence on the part of the State party militated in favour of concluding that the State party agreed that all admissibility requirements had been fulfilled. In the circumstances, the Committee was not precluded from considering the authors' claims on their merits.

7.2 On the basis of the State party's observations the Committee took, however, the opportunity to reconsider its admissibility decision. It noted in particular the authors' claim that they are discriminated against because French Polynesians are not protected by laws and regulations which apply to the territoire métropolitain, especially as far as protection of burial grounds is concerned. This claim could raise issues under article 26 of the Covenant but was not covered by the terms of the admissibility decision of 30 June 1994; the Committee was of the opinion, however, that it should be declared admissible and considered on its merits. The State party was invited to submit to the Committee information in respect of the authors' claim of discrimination. If the State party intended to challenge the admissibility of the claim, it was invited to join its observations in this respect to those on the substance of the claim, and the Committee would address them when examining the merits of the complaint.

7.3 On 30 October 1995, therefore, the Committee decided to amend its decision on admissibility of 30 June 1994.

8.1 By submission of 27 February 1996, counsel informs the Committee that on 16 January 1996, the High Commissioner of the French Republic for French Polynesia called in the forces of order to evacuate the (archaeological) site of Nuuroa, so as to enable the immediate start of construction of the hotel complex. At 5.30 a.m., a large number of police, later joined by a military detachment, occupied the grounds and put up a fence around the site. On 19 January, approximately 100 residents of the area protested on the beach of the site to express their opposition to the hotel complex, as well as the violation of the supposedly sacred nature of the site, on which human remains pointing to the existence of an ancient burial ground had been found in 1993. According to the association "Paruru Ia Tetaitapu Eo Nuuroa", poles for the fence were placed directly onto the old grave sites.

8.2 The authors forward a copy of an affidavit, sworn on 22 January 1996, by a lawyer acting upon instructions of Mr. G. Bennett, the president of the association "Paruru Ia Tetaitapu Eo Nuuroa". The affidavit states, inter alia, that along parts of the beach of the grounds on which the hotel is to be built, human remains have been discovered. To demonstrate the presence of human bones, Mr. Bennett dug into the sand of a little sandy elevation upon which extremities of several human bones appeared. Mr. Bennett then covered them again with sand. No more than one metre from this sandy elevation, fence poles had been planted. Mr. Bennett expressed his fear that during the construction of the fence, human remains might inadvertently have been exposed.

8.3 The authors reaffirm that they are victims of discrimination within the meaning of article 26, since French legislation governing the protection of burial sites is not applicable to French Polynesia.

9.1 In a submission dated 6 June 1996, the State party once again challenges the admissibility of the authors' claim inasmuch as it relates to article 26 on the ground that they cannot pretend to be "victims" of a violation of this provision.[11] It submits that the authors have failed to show that the human remains discovered on the disputed grounds in January 1993 are in fact those of their ancestors, or that the burial ground was that in which their ancestors had been buried. The State party reiterates that, according to forensic tests carried out by the Polynesian Centre of Human Sciences, the skeletons discovered pre-date the arrival of Europeans in Polynesia. Accordingly, the authors have no personal, direct and current interest in invoking the application of legislation governing the protection of burial grounds, as they fail to establish a kinship link between the remains discovered and themselves.

9.2 In this context, the State party points out that respect for the deceased does not necessarily extend to individuals buried long ago and whose memory has been lost for centuries. To the contrary, it would be necessary to conclude that each time human remains are found on a site cleared for construction, this site becomes inconstructible because the remains are hypothetically those of the ancestors of a family which still exists. Accordingly, the State party concludes that French legislation governing the existence of burial grounds is not applicable to the authors and that their claim under article 26 should be deemed inadmissible under article 1 of the Optional Protocol.

9.3 Subsidiarily, the State party contends that there can be no question of a violation of article 26 in the present case. In effect, the relevant provisions of the French Criminal Code[12] are also applicable to French Polynesia since the adoption of Ordinance No. 96267 of 28 March 1996, relative to the entry into force of the new Criminal Code in the French overseas territories and in Mayotte. Therefore, the authors are ill advised to complain about discriminatory application of criminal legislation governing protection of burial sites. The State party adds that the authors had never, up to mid-1996, filed any action complaining about a violation of burial grounds.

9.4 In additional observations, the State party argues that the existence of different legislative texts in metropolitan France and overseas territories does not necessarily imply a violation of the non-discrimination principle enshrined in article 26. It explains that pursuant to article 74 of the French Constitution and implementing legislation, legislative texts adopted for metropolitan France are not automatically and fully applicable to overseas territories, given the geographic, social and economic particularities of these territories. Thus, legislative texts applicable to French Polynesia are either adopted by State organs or by the competent authorities of French Polynesia.

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[11] Reference is made to the Committee's jurisprudence in this respect, especially to the inadmissibility decision in communication No. 187/1985 (J. H. v. Canada), adopted 12 April 1985.

[12] Articles 225-17 and 225-18 of the French Criminal Code.

9.5 Recalling the Committee's jurisprudence, the State party notes that article 26 does not prohibit all difference in treatment, if such difference in treatment is based on reasonable and objective criteria. It submits that the legislative and regulatory differences between metropolitan France and overseas territories are based on such objective and reasonable criteria, as stipulated in article 74 of the Constitution, which explicitly refers to the "specific interests" of the overseas territories. The notion of "specific interests" is designed to protect the particularities of overseas territories and justifies the attribution of particular competencies to the authorities of French Polynesia. This said, the regulations governing the protection of burial sites are very similar in metropolitan France and in French Polynesia.

9.6 In the latter context, the State party observes that article L. 131 al.2 of the Code des Communes actually applies both in metropolitan France and in Polynesia. The implementation regulations based on this provision may not be based on the same texts in metropolitan France and in French Polynesia, but in practice the differences are insignificant. Thus, the prohibition to exhume the body of a deceased person without prior authorization is contained both in article 28 of Decision (Arrêté) No. 583 S of 9 April 1953, which is applicable in French Polynesia, and in article R. 361-15 of the Code des Communes.

9.7 The State party further observes that, in 1989, French Polynesia adopted legislation governing the urbanization of its territory (Code d'aménagement du territoire). Chapter five of this legislation governs the protection of historical sites, monuments, as well as archaeological activities. The provisions of this legislation are largely inspired by the laws of 2 May 1930 and of 27 September 1941 (the latter governing archaeological excavations), and which apply in metropolitan France.[13] Reference is made by the State party to article D. 151-2, paragraph 1, of the Code de l'aménagement de la Polynésie française, which provides, inter alia, that sites and monuments the preservation of which is of historical, artistic, scientific or other interest may be placed under partial or complete protection ("... peuvent faire l'objet d'un classement en totalité ou en partie"). This provision, it is argued, would apply to the protection of sites presenting a particular interest. Article D. 151-8 of the same Code stipulates that the objects and sites or monuments which are placed under protection cannot be destroyed or displaced, or be restored, without prior authorization of the chief administrative officer of French Polynesia.[14] Finally, article D. 154-8 of the same Code specifically covers the accidental discovery of burial sites: under this provision, the discovery of burial sites must be notified immediately to the competent administrative authority.

9.8 The State party contends that the above provisions fully protect the authors' interests and may provide a remedy to their concerns. Contrary to the authors' affirmation, legislation does exist in French Polynesia that provides for the protection of historical sites and burial grounds and of archaeological sites presenting a particular interest.

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[13] The State party provides copies of the texts of these laws.

[14] "... les biens, les sites et les monuments naturels classés et les parcelles de ceux-ci ne peuvent être détruits et déplacés ni être l'objet d'un travail de restoration ... sans l'autorisation du chef de territoire suivant les conditions qu'il aura fixées..." (this provision is similar to article 12 of the Law of 2 May 1930 applying in metropolitan France).

9.9 By submission of 26 August 1996, counsel informs the Committee of the death of Mr. Hopu, and indicates that his heirs have signalled their wish to pursue the examination of the communication.

Examination of the merits

10.1 The Human Rights Committee has examined the present communication in the light of all the information presented to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

10.2 The authors claim that they were denied access to an independent and impartial tribunal, in violation of article 14, paragraph 1. In this context, they claim that the only tribunals that could have had competence to adjudicate land disputes in French Polynesia are indigenous tribunals and that these tribunals ought to have been made available to them. The Committee observes that the authors could have brought their case before a French tribunal, but that they deliberately chose not to do so, claiming that French authorities should have kept indigenous tribunals in operation. The Committee observes that the dispute over ownership of the land was disposed of by the Tribunal of Papeete in 1961 and that the decision was not appealed by the previous owners. No further step was made by the authors to challenge the ownership of the land, nor its use, except by peaceful occupation. In these circumstances, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 1.

10.3 The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of article 17, paragraph 1, and article 23, paragraph 1.

10.4 As set out in paragraph 7.3 of the decision of 30 October 1995, the Committee has further considered the authors' claim of discrimination, in violation of article 26 of the Covenant, on account of the alleged absence of specific legal protection of burial grounds in French Polynesia. The Committee has noted the State party's challenge to the admissibility of this claim, as well as the subsidiary detailed arguments relating to its merits.

10.5 On the basis of the information placed before it by the State party and the authors, the Committee is not in a position to determine whether or not there has been an independent violation of article 26 in the circumstances of the instant communication.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before it disclose violations of article 17, paragraph 1, and article 23, paragraph 1, of the Covenant.

12. The Human Rights Committee is of the view that the authors are entitled, under article 2, paragraph 3 (a), of the Covenant, to an appropriate remedy. The State party is under an obligation to protect the authors' rights effectively and to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

APPENDIX

A. Individual opinion by Committee members Elizabeth Evatt, Cecilia Medina Quiroga, Fausto Pocar, Martin Scheinin and Maxwell Yalden (*Partly dissenting*)

[Original: English]

We do not share the Committee's decision of 30 June 1994 to declare the authors' complaint inadmissible in relation to article 27 of the Covenant. Whatever the legal relevance of the declaration made by France in relation to the applicability of article 27 may be in relation to the territory of metropolitan France, we do not consider the justification given in said declaration to be of relevance in relation to overseas territories under French sovereignty. The text of said declaration makes reference to article 2 of the French Constitution of 1958, understood to exclude distinctions between French citizens before the law. Article 74 of the same Constitution, however, includes a special clause for overseas territories, under which they shall have a special organization which takes into account their own interests within the general interests of the Republic. That special organization may entail, as France has pointed out in its submissions in the present communication, a different legislation given the geographic, social and economic particularities of these territories. Thus, it is the declaration itself, as justified by France, which makes article 27 of the Covenant applicable insofar as overseas territories are concerned.

In our opinion, the communication raises important issues under article 27 of the Covenant which should have been addressed on their merits, notwithstanding the declaration made by France under article 27.

After the Committee decided not to reopen the issue of admissibility of the authors' claim under article 27, we are able to associate ourselves with the Committee's Views on the remaining aspects of the communication.

B. Individual opinion by Committee members David Kretzmer and Thomas Buergenthal, co-signed by Nisuke Ando and Lord Colville (*Dissenting*)

[Original: English]

1. Unfortunately we are unable to join the Committee's view that violations of articles 17 and 23 of the Covenant have been substantiated in the present communication.

2. This Committee has held in the past (Communication No. 220/1987 and Communication No. 222/1987, declared inadmissible on 8 November 1989) that the French declaration upon ratification of the Covenant regarding article 27 must be read as a reservation, according to which France is not bound by this article. Relying on this decision, the Committee held in its decision on admissibility of 30 June 1994, that the authors' communication was not admissible as regards an alleged violation of article 27. This decision, which was phrased in general terms, precludes us from examining whether the French declaration applies not only in metropolitan France, bu[illegible]so in overseas territories, in which the State party itself concedes t[illegible] special conditions may apply.

3. The authors’ claim is that the State party has failed to protect an ancestral burial ground, which plays an important role in their heritage. It would seem that this claim could raise the issue of whether such failure by a State party involves denial of the right of religious or ethnic minorities, in community with other members of their group, to enjoy their own culture or to practise their own religion. However, for the reasons set out above, the Committee was precluded from examining this issue. Instead the Committee holds that allowing the building on the burial ground constitutes arbitrary interference with the authors’ family and privacy. We cannot accept these propositions.

4. In reaching the conclusion that the facts in the instant case do not give rise to an interference with the authors’ family and privacy, we do not reject the view, expressed in the Committee’s General Comment 16 on article 17 of the Covenant, that the term "family" should "be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned". Thus, the term "family", when applied to the local population in French Polynesia, might well include relatives who would not be included in a family, as this term is understood in other societies, including metropolitan France. However, even when the term "family" is extended, it does have a discrete meaning. It does not include all members of one’s ethnic or cultural group. Nor does it necessarily include all one’s ancestors, going back to time immemorial. The claim that a certain site is an ancestral burial ground of an ethnic or cultural group, does not, as such, imply that it is the burial ground of members of the authors’ family. The authors have provided no evidence that the burial ground is one that is connected to their family, rather than to the whole of the indigenous population of the area. The general claim that members of their families are buried there, without specifying in any way the nature of the relationship between themselves and the persons buried there, is insufficient to support their claim, even on the assumption that the notion of family is different from notions that prevail in other societies. We therefore cannot accept the Committee’s view that the authors have substantiated their claim that allowing building on the burial ground amounted to interference with their family.

5. The Committee mentions the authors’ claim "that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life". Relying on the fact that the State party has challenged neither this claim nor the authors’ argument that the burial grounds play an important part in their history, culture and life, the Committee concludes that the construction of the hotel complex on the burial grounds interferes with the authors’ right to family and privacy. The reference by the Committee to the authors’ history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. We regret that the Committee is prevented from applying article 27 in the instant case.

6. Contrary to the Committee, we cannot accept that the authors’ claim of an interference with their right to privacy has been substantiated. The only reasoning provided to support the Committee’s conclusion in this matter is the authors’ claim that their connection with their ancestors plays an important role in their identity. The notion of privacy revolves around protection of those aspects of a person’s life, or relationships with others, which one chooses to keep from the public eye, or from outside intrusion. It does not include access to public property, whatever the nature of that property, or the

purpose of the access. Furthermore, the mere fact that visits to a certain site play an important role in one's identity, does not transform such visits into part of one's right to privacy. One can think of many activities, such as participation in public worship or in cultural activities, that play important roles in persons' identities in different societies. While interference with such activities may involve violations of articles 18 or 27, it does not constitute interference with one's privacy.

7. We reach the conclusion that there has been no violation of the authors' rights under the Covenant in the present communication with some reluctance. Like the Committee we too are concerned with the failure of the State party to respect a site that has obvious importance in the cultural heritage of the indigenous population of French Polynesia. We believe, however, that this concern does not justify distorting the meaning of the terms family and privacy beyond their ordinary and generally accepted meaning.

I. Communication No. 550/1993; Robert Faurisson v. France (Views adopted on 8 November 1996, fifty-eighth session)

Submitted by:	Robert Faurisson
Victim:	The author
State party:	France
Date of communication:	2 January 1993 (initial submission)
Date of decision on admissibility:	19 July 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 November 1996,

Having concluded its consideration of Communication No. 550/1993 submitted to the Human Rights Committee by Mr. Robert Faurisson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[*] [**]

1. The author of the communication, dated 2 January 1993, is Robert Faurisson, born in the United Kingdom in 1929 and with dual French/British citizenship, currently residing in Vichy, France. He claims to be a victim of violations of his human rights by France. The author does not invoke specific provisions of the Covenant.

Facts as submitted by the author

2.1 The author was a professor of literature at the Sorbonne University in Paris until 1973 and at the University of Lyon until 1991, when he was removed from his chair. Aware of the historical significance of the Holocaust, he has sought proof of the methods of killings, in particular by gas asphyxiation. While he does not contest the use of gas for purposes of disinfection, he doubts the existence of gas chambers for extermination purposes ("*chambres à gaz homicides*") at Auschwitz and in other Nazi concentration camps.

2.2 The author submits that his opinions have been rejected in numerous academic journals and ridiculed in the daily press, notably in France;

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[*] Pursuant to rule 85 of the Committee's rules of procedure, Committee members Christine Chanet and Thomas Buergenthal did not participate in the consideration of the case. A statement made by Mr. Buergenthal is appended to the present document.

[**] The text of five individual opinions, signed by seven Committee members, is appended to the present document.

nonetheless, he continues to question the existence of extermination gas chambers. As a result of public discussion of his opinions and the polemics accompanying these debates, he states that, since 1978, he has become the target of death threats and that on eight occasions he has been physically assaulted. On one occasion in 1989, he claims to have suffered serious injuries, including a broken jaw, for which he was hospitalized. He contends that although these attacks were brought to the attention of the competent judicial authorities, they were not seriously investigated and none of those responsible for the assaults has been arrested or prosecuted. On 23 November 1992, the Court of Appeal of Riom followed the request of the prosecutor of the _Tribunal de Grande Instance_ of Cusset and decreed the closure of the proceedings (_ordonnance de non-lieu_) which the authorities had initiated against X.

2.3 On 13 July 1990, the French legislature passed the so-called "Gayssot Act", which amends the law on the Freedom of the Press of 1881 by adding an article 24 _bis_; the latter makes it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg from 1945 to 1946. The author submits that, in essence, the "Gayssot Act" promotes the Nuremberg trial and judgement to the status of dogma, by imposing criminal sanctions on those who dare to challenge its findings and premises. Mr. Faurisson contends that he has ample reason to believe that the records of the Nuremberg trial can indeed be challenged and that the evidence used against Nazi leaders is open to question, as is, according to him, the evidence about the number of victims exterminated at Auschwitz.

2.4 In substantiation of the claim that the Nuremberg records cannot be taken as infallible, he cites, by way of example, the indictment which charged the Germans with the Katyn massacre, and refers to the introduction by the Soviet prosecutor of documents purporting to show that the Germans had killed the Polish prisoners of war at Katyn (Nuremberg document USSR-054). The Soviet authorship of this crime, he points out, is now established beyond doubt. The author further notes that, among the members of the Soviet Katyn (Lyssenko) Commission, which had adduced proof of the purported German responsibility for the Katyn massacre, were Professors Burdenko and Nicolas, who also testified that the Germans had used gas chambers at Auschwitz for the extermination of four million persons (document USSR-006). Subsequently, he asserts, the estimated number of victims at Auschwitz has been revised downward to approximately one million.

2.5 Shortly after the enactment of the "Gayssot Act", Mr. Faurisson was interviewed by the French monthly magazine _Le Choc du Mois_, which published the interview in its Number 32 issue of September 1990. Besides expressing his concern that the new law constituted a threat to freedom of research and freedom of expression, the author reiterated his personal conviction that there were no homicidal gas chambers for the extermination of Jews in Nazi concentration camps. Following the publication of this interview, 11 associations of French resistance fighters and of deportees to German concentration camps filed a private criminal action against Mr. Faurisson and Patrice Boizeau, the editor of the magazine _Le Choc du Mois_. By judgement of 18 April 1991, the 17th _Chambre Correctionnelle du Tribunal de Grande Instance de Paris_ convicted Messrs. Faurisson and Boizeau of having committed the crime of "_contestation de crimes contre l'humanité_" and imposed on them fines and costs amounting to FF 326,832.

2.6 The conviction was based, _inter alia_, on the following Faurisson statements:

> "... No one will have me admit that two plus two make five, that the earth is flat, or that the Nuremberg Tribunal was infallible. I have excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber ..."
>
> "I would wish to see that 100 per cent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication ('est une gredinerie'), endorsed by the victorious powers of Nuremberg in 1945-46 and officialized on 14 July 1990 by the current French Government, with the approval of the 'court historians'".

2.7 The author and Mr. Boizeau appealed their conviction to the Court of Appeal of Paris (Eleventh Chamber). On 9 December 1992, the Eleventh Chamber, under the Presidency of Mrs. Françoise Simon, upheld the conviction and fined Messrs. Faurisson and Boizeau a total of FF 374,045.50. This sum included compensation for immaterial damage to the eleven plaintiff associations. The Court of Appeal did, inter alia, examine the facts in the light of articles 6 and 10 of the European Convention of Human Rights and Fundamental Freedoms and concluded that the court of first instance had evaluated them correctly. The author adds that, in addition to this penalty, he incurred considerable additional expenses, including attorney's fees for his defence and hospitalization costs as a result of injuries sustained when he was assaulted by members of Bétar and Tagar on the first day of the trial.

2.8 The author observes that the "Gayssot Act" has come under attack even in the French National Assembly. Thus, in June 1991, Mr. Jacques Toubon, a member of Parliament for the Rassemblement pour la République (RPR) and currently the French Minister of Justice, called for the abrogation of the Act. Mr. Faurisson also refers to the criticism of the Gayssot Act by Mrs. Simone Veil, herself an Auschwitz survivor, and by one of the leading legal representatives of a Jewish association. In this context, the author associates himself with a suggestion put forward by Mr. Philippe Costa, another French citizen tried under article 24 bis and acquitted by the Court of Appeal of Paris on 18 February 1993, to the effect that the Gayssot Act be replaced by legislation specifically protecting all those who might become victims of incitement to racial hatred and in particular to anti-semitism, without obstructing historical research and discussion.

2.9 Mr. Faurisson acknowledges that it would still be open to him to appeal to the Court of Cassation; he claims, however, that he does not have the FF 20,000 of lawyers' fees which such an appeal would require, and that in any event, given the climate in which the trial at first instance and the appeal took place, a further appeal to the Court of Cassation would be futile. He assumes that even if the Court of Cassation were to quash the judgements of the lower instances, it would undoubtedly order a re-trial, which would produce the same results as the initial trial in 1991.

Complaint

3.1 The author contends that the "Gayssot Act" curtails his right to freedom of expression and academic freedom in general, and considers that the law targets him personally ("lex Faurissonia"). He complains that the incriminated provision constitutes unacceptable censorship, obstructing and penalizing historical research.

3.2 In respect of the judicial proceedings, Mr. Faurisson questions, in particular, the impartiality of the Court of Appeal (Eleventh Chamber). Thus, he contends that the President of the Chamber turned her face away from him throughout his testimony and did not allow him to read any document in court, not even excerpts from the Nuremberg verdict, which he submits was of importance for his defence.

3.3 The author states that, on the basis of separate private criminal actions filed by different organizations, both he and Mr. Boizeau are being prosecuted for the same interview of September 1990 in two other judicial instances which, at the time of submission of the communication, were scheduled to be heard in June 1993. This he considers to be a clear violation of the principle ne bis in idem.

3.4 Finally, the author submits that he continues to be subjected to threats and physical aggressions to such an extent that his life is in danger. Thus, he claims to have been assaulted by French citizens on 22 May 1993 in Stockholm, and again on 30 May 1993 in Paris.

State party's submission on the question of admissibility and author's comments thereon

4.1 In its submission under rule 91, the State party provides a chronological overview of the facts of the case and explains the ratio legis of the law of 13 July 1990. In this latter context, it observes that the law in question fills a gap in the panoply of criminal sanctions by criminalizing the acts of those who question the genocide of the Jews and the existence of gas chambers. In the latter context, it adds that the so-called "revisionist" theses had previously escaped any criminal qualification, in that they could not be subsumed under the prohibition of (racial) discrimination, of incitement to racial hatred, or glorification of war crimes or crimes against humanity.

4.2 The State party further observes that in order to avoid making it an offence to manifest an opinion ("délit d'opinion"), the legislature chose to determine precisely the material element of the offence, by criminalizing only the negation ("contestation"), by one of the means enumerated in article 23 of the law on the Freedom of the Press of 1881, of one or several of the crimes against humanity in the sense of article 6 of the Statute of the International Military Tribunal. The role of the judge seized of allegations of facts that might be subsumed under the new law is not to intervene in an academic or an historical debate, but to ascertain whether the contested publications of words negate the existence of crimes against humanity recognized by international judicial instances. The State party points out that the law of 13 July 1990 was noted with appreciation by the Committee on the Elimination of Racial Discrimination in March 1994.

4.3 The State party submits that the communication is inadmissible on the basis of non-exhaustion of domestic remedies insofar as the alleged violation of Mr. Faurisson's freedom of expression is concerned, as he did not appeal his case to the Court of Cassation. It recalls the Committee's jurisprudence that mere doubts about the effectiveness of available remedies do not absolve an author from availing himself of them. Furthermore, it contends that there is no basis for the author's doubt that recourse to the Court of Cassation could not provide him with judicial redress.

4.4 In this context, the State party notes that while the Court of Cassation indeed does not examine facts and evidence in a case, it does ascertain whether the law was applied correctly to the facts, and can determine that there was a violation of the law, of which the Covenant is an integral part (article 55 of the French Constitution of 4 June 1958). Article 55 stipulates that international treaties take precedence over domestic laws and, according to a judgement of the Court of Cassation of 24 May 1975, domestic laws contrary to an international treaty shall not be applied, even if the internal law was adopted after the conclusion of the treaty. Thus, the author remained free to invoke the Covenant before the Court of Cassation, as the Covenant takes precedence over the law of 13 July 1990.

4.5 As to the costs of an appeal to the Court of Cassation, the State party notes that pursuant to articles 584 and 585 of the Code of Criminal Procedure, it is not mandatory for a convicted person to be represented by counsel before the Court of Cassation. Furthermore, it observes that legal aid would be available to the author, upon sufficiently motivated request, in accordance with the provisions of Law 91-647 of 10 July 1991 (especially para. 10 thereof). The author did not file any such request, and in the absence of information about his financial resources, the State party contends that nothing would allow the conclusion that an application for legal aid, had it been filed, would not have been granted.

4.6 Concerning the alleged violation of article 14, paragraph 7, the State party underlines that the principle of "ne bis in idem" is firmly anchored in French law, which has been confirmed by the Court of Cassation in numerous judgements (see in particular article 6 of the Code of Criminal Procedure).

4.7 Thus, if new complaints and criminal actions against the author were entertained by the courts for facts already judged by the Court of Appeal of Paris on 9 December 1992, then, the State party affirms, the prosecutor and the court would have to invoke, ex officio, the principle of "non bis in idem" and thereby annul the new proceedings.

4.8 The State party dismisses the author's allegation that he was a target of other criminal procedures based on the same facts as manifestly abusive, in the sense that the sole existence of the judgement of 9 December 1992 is sufficient to preclude further prosecution. In any event, the State party argues that Mr. Faurisson failed to produce any proof of such prosecution.

5.1 In his comments on the State party's submission, the author argues that the editor-in-chief of the magazine Le Choc, which published the disputed interview in September 1990, did appeal to the Court of Cassation; on 20 December 1994, the Criminal Chamber of the Court of Cassation dismissed the appeal. The author was informed of this decision by registered letter of 21 February 1995 from the Registry of the Court of Appeal of Paris.

5.2 Mr. Faurisson reiterates that assistance of legal counsel in proceedings before the Court of Cassation is, if not necessarily required by law, indispensable in practice: if the Court may only determine whether the law was applied correctly to the facts of a case, the accused must have specialized legal knowledge himself so as to follow the hearing. On the question of legal aid, the author simply notes that such aid is generally not granted to individuals with the salary of a university professor, even if this salary is, in his own situation, severely reduced by an avalanche of fines, punitive damages and other legal fees.

5.3 The author observes that he invokes less a violation of the right to freedom of expression, which does admit of some restrictions, but of his right to freedom of opinion and to doubt, as well as freedom of academic research. The latter, he contends, may not, by its very nature, be subjected to limitations. However, the Law of 13 July 1990, unlike comparable legislation in Germany, Belgium, Switzerland or Austria, does limit the freedom to doubt and to carry out historical research in strict terms. Thus, it elevates to the rank of infallible dogma the proceedings and the verdict of the International Military Tribunal sitting at Nuremberg. The author notes that the proceedings of the Tribunal, its way of collecting and evaluating evidence, and the personalities of the judges themselves have been subjected to trenchant criticism over the years, to such an extent that one could call the proceedings a "mascarade" (... "la sinistre et déshonorante mascarade judiciaire de Nuremberg").

5.4 The author dismisses as absurd and illogical the ratio legis adduced by the State party, in that it even prohibits historians from proving, rather than negating, the existence of the Shoah or the mass extermination of Jews in the gas chambers. He contends that in the way it was drafted and is applied, the law endorses the orthodox Jewish version of the history of the Second World War once and for all.

5.5 As to the alleged violation of article 14, paragraph 7, the author reaffirms that one and the same interview published in one and the same publication resulted in three (distinct) proceedings before the XVIIth Criminal Chamber of the Tribunal de Grande Instance of Paris. These cases were registered under the following registry codes: (1) P. 90 302 0325/0; (2) P. 90 302 0324/1; and (3) P. 90 271 0780/1. On 10 April 1992, the Tribunal decided to suspend the proceedings inasmuch as the author was concerned for the last two cases, pending a decision on the author's appeal against the judgement in the first case. The proceedings remained suspended after the judgement of the Court of Appeal, until the dismissal of the appeal filed by the journal Le Choc du Mois by the Court of Cassation on 20 December 1994. Since then, the procedure in the last two cases has resumed, and hearings took place on 27 January and 19 May 1995. Another hearing was scheduled for 17 October 1995.

Committee's decision on admissibility

6.1 During its fifty-fourth session, the Committee considered the admissibility of the communication. It noted that, at the time of the submission of the communication on 2 January 1993, the author had not appealed the judgement of the Court of Appeal of Paris (Eleventh Chamber) of 9 December 1992 to the Court of Cassation. The author argued that he did not have the means to secure legal representation for that purpose and that such an appeal would, at any rate, be futile. As to the first argument, the Committee noted that it was open to the author to seek legal aid, which he did not. As to the latter argument the Committee referred to its constant jurisprudence that mere doubts about the effectiveness of a remedy do not absolve an author from resorting to it. At the time of submission, therefore, the communication did not meet the requirement of exhaustion of domestic remedies set out in article 5, paragraph 2 (b), of the Optional Protocol. In the meantime, however, the author's co-accused, the editor-in-chief of the magazine Le Choc, which published the disputed interview in September 1990, had appealed to the Court of Cassation, which, on 20 December 1994, dismissed the appeal. The judgement delivered by the Criminal Chamber of the Court of Cassation reveals that the court concluded that the law was applied correctly to the facts, that the law was constitutional and that its application was not inconsistent with the French Republic's obligations under international human rights treaties, with specific reference to the provisions of article 10 of the European Convention on Human Rights, which provisions protect the right to freedom of opinion and expression in terms which are similar to the terms used in article 19 of the International Covenant on Civil and Political Rights for the same purpose. In the circumstances, the Committee held that it would not be reasonable to require the author to have recourse to the Court of Cassation on the same matter. That remedy could no longer be seen as an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, i.e., a remedy that would provide the author with a reasonable prospect of judicial redress. The communication, therefore, no longer suffered from the initial bar of non-exhaustion of domestic remedies, in so far as it appeared to raise issues under article 19 of the Covenant.

6.2 The Committee considered that the author had sufficiently substantiated, for purposes of admissibility, his complaint about alleged violations of his right to freedom of expression, opinion and of academic research. These allegations should, accordingly, be considered on their merits.

6.3 On the other hand, the Committee found that the author had failed, for purposes of admissibility, to substantiate his claim that his right not to be tried twice for the same offence had been violated. The facts of the case did not reveal that he had invoked that right in the proceedings that were pending against him. The Committee noted the State party's submission that the prosecutor and the court would be obliged to apply the principle of "non bis in idem" if invoked and to annul the new proceedings if they related to the same facts as those judged by the Court of Appeal of Paris on 9 December 1992. The author, therefore, had no claim in this respect under article 2 of the Optional Protocol.

6.4 Similarly, the Committee found that the author had failed, for purposes of admissibility, to substantiate his claims related to the alleged partiality of judges on the Eleventh Chamber of the Court of Appeal of Paris and the alleged reluctance of the judicial authorities to investigate aggressions to which he claims to have been subjected. In this respect, also, the author had no claim under article 2 of the Optional Protocol.

6.5 On 19 July 1995, therefore, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under article 19 of the Covenant.

State party's observations on the merits and author's comments thereon

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party considers that the author's claim should be dismissed as incompatible ratione materiae with the provisions of the Covenant, and subsidiarily as manifestly ill-founded.

7.2 The State party once again explains the legislative history of the "Gayssot Act". It notes, in this context, that anti-racism legislation adopted by France during the 1980s was considered insufficient to prosecute and punish, inter alia, the trivialization of Nazi crimes committed during the Second World War. The Law adopted on 13 July 1990 responded to the preoccupations of the French legislator vis-à-vis the development, for several years, of "revisionism", mostly through individuals who justified their writings by their (perceived) status as historians, and who challenged the existence of the Shoah. To the Government, these revisionist theses constitute "a subtle form of contemporary anti-semitism" ("... constituent une forme subtile de l'antisémitisme contemporain") which, prior to 13 July 1990, could not be prosecuted under any of the existing provisions of French criminal legislation.

7.3 The legislator thus sought to fill a legal vacuum, while attempting to define the new provisions against revisionism in as precise a manner as possible. The former Minister of Justice, Mr. Arpaillange, had aptly summarized the position of the then Government by stating that it was impossible not to devote oneself fully to the fight against racism, adding that racism did not constitute an opinion but an aggression and that every time racism was allowed to express itself publicly the public order was immediately and severely threatened. It was exactly because Mr. Faurisson expressed his anti-semitism through the publication of his revisionist theses in journals and magazines and thereby tarnished the memory of the victims of Nazism that he was convicted in application of the Law of 13 July 1990.

7.4 The State party recalls that article 5, paragraph 1, of the Covenant allows a State party to deny any group or individual any right to engage in activities aimed at the destruction of any of the rights and freedoms recognized in the Covenant; similar wording is found in article 17 of the European Convention on Human Rights and Fundamental Freedoms. The State party refers to a case examined by the European Commission of Human Rights,[15] which in its opinion presents many similarities with the present case and whose ratio decidendi could be used for the determination of Mr. Faurisson's case. In this case, the European Commission observed that article 17 of the European Convention concerned essentially those rights which would enable those invoking them to exercise activities which effectively aim at the destruction of the rights recognized by the Convention ("... vise essentiellement les droits qui permettraient, si on les invoquait, d'essayer d'en tirer le droit de se livrer effectivement à des activités visant à la destruction des droits ou libertés reconnus dans la Convention"). It held that the authors, who were prosecuted for possession of pamphlets whose content incited to racial hatred and who had invoked their right to freedom of expression, could not invoke article 10 of the European Convention (the equivalent of article 19 of the Covenant), as they were claiming this right in order to exercise activities contrary to the letter and the spirit of the Convention.

7.5 Applying these arguments to the case of Mr. Faurisson, the State party notes that the tenor of the interview with the author which was published in Le Choc (in September 1990) was correctly qualified by the Court of Appeal of Paris as falling under the scope of application of article 24 bis of the Law of 29 July 1881, as modified by the Law of 13 July 1990. By challenging the reality of the extermination of Jews during the Second World War, the author incites his readers to anti-semitic behaviour ("... conduit ses lecteurs sur la voie de comportements antisémites") contrary to the Covenant and other international conventions ratified by France.

7.6 To the State party, the author's judgement on the ratio legis of the Law of 13 July 1990, as contained in his submission of 14 June 1995 to the Committee, i.e. that the law casts in concrete the orthodox Jewish version of the history of the Second World War, clearly reveals the démarche adopted by the author: under the guise of historical research, he seeks to accuse the Jewish people of having falsified and distorted the facts of the Second World War and thereby having created the myth of the extermination of the Jews. That Mr. Faurisson designated a former Chief Rabbi (Grand rabbin) as the author of the law of 13 July 1990, whereas the law is of parliamentary origin, is another illustration of the author's methods to fuel anti-semitic propaganda.

7.7 On the basis of the above, the State party concludes that the author's "activities", within the meaning of article 5 of the Covenant, clearly contain elements of racial discrimination, which is prohibited under the Covenant and other international human rights instruments. The State party invokes article 26 and, in particular, article 20, paragraph 2, of the Covenant, which stipulates that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Furthermore, the State party recalls that it is a party to the International Convention on the Elimination of All Forms of Racial Discrimination; under article 4 of that Convention, States parties "shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred" (para. 4 (a)). The Committee on the Elimination of Racial Discrimination specifically welcomed the adoption of the law of 13 July 1990 during the examination of the periodic report of France in 1994. In the light of the above, the State party concludes that it merely complied with its international obligations by making the (public) denial of crimes against humanity a criminal offence.

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[15] Communication No. 8348/78 and Communication No. 8406/78 (Glimmerveen and Hagenbeek v. The Netherlands), declared inadmissible on 11 October 1979.

7.8 The State party further recalls the decision of the Human Rights Committee in Communication No. 104/1981,[16] where the Committee had held that "the opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit", and that the claim of the author based on article 19 was inadmissible as incompatible with the provisions of the Covenant. This reasoning, the State party submits, should be applied to the case of Mr. Faurisson.

7.9 On a subsidiary basis, the State party contends that the author's claim under article 19 is manifestly without merits. It notes that the right to freedom of expression laid down in article 19 of the Covenant is not without limits (cf. article 19, para. 3), and that French legislation regulating the exercise of this right is perfectly consonant with the principles laid down in article 19; this has been confirmed by a decision of the French Constitutional Court of 10 and 11 October 1984.[17] In the instant case, the limitations on Mr. Faurisson's right to freedom of expression flow from the law of 13 July 1990.

7.10 The State party emphasizes that the text of the law of 13 July 1990 reveals that the offence of which the author was convicted is defined in precise terms and is based on objective criteria, so as to avoid the creation of a category of offences linked merely to expression of opinions ("délit d'opinion"). The committal of the offence necessitates (a) the denial of crimes against humanity, as defined and recognized internationally, and (b) that these crimes against humanity have been adjudicated by judicial instances. In other words, the law of 13 July 1990 does not punish the expression of an opinion, but the denial of a historical reality universally recognized. The adoption of the provision was necessary in the State party's opinion, not only to protect the rights and the reputation of others, but also to protect public order and morals.

7.11 In this context, the State party recalls once more the virulent terms in which the author, in his submission of 14 June 1995 to the Committee, had criticized the judgement of the International Tribunal of Nuremberg, dismissing it as a sinister and dishonouring judicial sham ("... la sinistre et déshonorante mascarade judiciaire de Nuremberg"). In so doing, he not only challenged the validity of the judgement of the Nuremberg Tribunal, but also unlawfully attacked the reputation and the memory of the victims of Nazism.

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[16] Communication No. 104/1981 (J.R.T. and the W.G. Party v. Canada), declared inadmissible on 6 April 1983, para. 8 (b).

[17] No. 84-181 D.C. of 10 and 11 October 1984, Rec. p. 78.

7.12 In support of its arguments, the State party refers to decisions of the European Commission of Human Rights addressing the interpretation of article 10 of the European Convention (the equivalent of para. 19 of the Covenant). In a case decided on 16 July 1982,[18] which concerned the prohibition, by judicial decision, of display and sale of brochures arguing that the assassination of millions of Jews during the Second World War was a Zionist fabrication, the Commission held that "it was neither arbitrary nor unreasonable to consider the pamphlets displayed by the applicant as a defamatory attack against the Jewish community and against each individual member of this community. By describing the historical fact of the assassination of millions of Jews, a fact which was even admitted by the applicant himself, as a lie and zionist swindle, the pamphlets in question not only gave a distorted picture of the relevant historical facts but also contained an attack on the reputation of all those ... described as liars and swindlers ...". The Commission further justified the restrictions on the applicant's freedom of expression, arguing that the "restriction was ... not only covered by a legitimate purpose recognized by the Convention (namely the protection of the reputation of others), but could also be considered as necessary in a democratic society. Such a society rests on the principles of tolerance and broad-mindedness which the pamphlets in question clearly failed to observe. The protection of these principles may be especially indicated vis-à-vis groups which have historically suffered from discrimination ...".

7.13 The State party notes that identical considerations transpire from the judgement of the Court of Appeal of Paris of 9 December 1992, which confirmed the conviction of Mr. Faurisson, by reference, inter alia, to article 10 of the European Convention and to the International Convention on the Elimination of All Forms of Racial Discrimination. It concludes that the author's conviction was fully justified, not only by the necessity of securing respect for the judgement of the International Military Tribunal at Nuremberg, and through it the memory of the survivors and the descendants of the victims of Nazism, but also by the necessity of maintaining social cohesion and public order.

8.1 In his comments, the author asserts that the State party's observations are based on a misunderstanding: he concedes that the freedoms of opinion and of expression indeed have some limits, but he invokes less these freedoms than the freedom to doubt and the freedom of research which, to his mind, do not permit any restrictions. The latter freedoms are violated by the law of 13 July 1990, which elevates to the level of only and unchallengeable truth what a group of individuals, judges of an international military tribunal had decreed in advance as being authentic. Mr. Faurisson notes that the Governments of Spain and the United Kingdom have recently recognized that anti-revisionist legislation of the French model is a step backward both for the law and for history.

8.2 The author reiterates that the desire to fight anti-semitism cannot justify any limitations on the freedom of research on a subject which is of obvious interest to Jewish organizations: the author qualifies as "exorbitant" the "privilege of censorship" from which the representatives of the Jewish community in France benefit. He observes that no other subject he is aware of has ever become a virtual taboo for research, following a request by another political or religious community. To him, no law should be allowed to prohibit the publication of studies on any subject, under the pretext that there is nothing to research on it.

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[18] Communication No. 9235/81 (X. v. Federal Republic of Germany), declared inadmissible on 16 July 1982.

8.3 Mr. Faurisson asserts that the State party has failed to provide the slightest element of proof that his own writings and theses constitute a "subtle form of contemporary anti-semitism" (see para. 7.2 above) or incite the public to anti-semitic behaviour (see para. 7.5 above). He accuses the State party of hubris in dismissing his research and writings as "pseudo-scientific" ("prétendument scientifique"), and adds that he does not deny anything but merely challenges what the State party refers to as a "universally recognized reality" ("une réalité universellement reconnue"). The author further observes that the revisionist school has, over the past two decades, been able to dismiss as doubtful or wrong so many elements of the "universally recognized reality" that the impugned law becomes all the more unjustifiable.

8.4 The author denies that there is any valid legislation which would prevent him from challenging the verdict and the judgement of the International Tribunal at Nuremberg. He challenges the State party's argument that the basis for such prohibition precisely is the law of 13 July 1990 as pure tautology and petitio principis. He further notes that even French jurisdictions have admitted that the procedures before and decisions of the International Tribunal could justifiably be criticized.[19]

8.5 The author observes that, on the occasion of a recent revisionist affair (case of Roger Garaudy), the vast majority of French intellectuals as well as representatives of the French League for Human Rights have publicly voiced their opposition to the maintenance of the law of 13 July 1990.

8.6 As to the violations of his right to freedom of expression and opinion, the author notes that this freedom remains severely limited: thus, he is denied the right of reply in the major media, and judicial procedures in his case are tending to become closed proceedings ("... mes procès tendent à devenir des procès à huis-clos"). Precisely because of the applicability of the law of 13 July 1990, it has become an offence to provide column space to the author or to report the nature of his defence arguments during his trials. Mr. Faurisson notes that he sued the newspaper Libération for having refused to grant him a right of reply; he was convicted in first instance and on appeal and ordered to pay a fine to the newspaper's director. Mr. Faurisson concludes that he is, in his own country, "buried alive".

8.7 Mr. Faurisson argues that it would be wrong to examine his case and his situation purely in the light of legal concepts. He suggests that his case should be examined in a larger context: by way of example, he invokes the case of Galileo, whose discoveries were true, and any law which would have enabled his conviction would have been by its very nature wrong or absurd.
Mr. Faurisson contends that the law of 13 July 1990 was hastily drafted and put together by three individuals and that the draft law did not pass muster in the National Assembly when introduced in early May 1990. He submits that it was only after the profanation of the Jewish cemetery at Carpentras (Vaucluse) on 10 May 1990 and the alleged "shameless exploitation" ("exploitation nauséabonde") of this event by the then Minister of the Interior, P. Joxe, and the President of the National Assembly, L. Fabius, that the law passed. If adopted under such circumstances, the author concludes, it cannot but follow

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[19] Cf. Seventeenth Criminal Chamber, Tribunal Correctionnel de Paris, 18 April 1991.

that it must one day disappear, just as the "myth" of the gas chambers at Auschwitz.

8.8 In a further submission dated 3 July 1996 the State party explains the purposes pursued by the act of 13 July 1990. It points out that the introduction of the act was in fact intended to serve the struggle against anti-semitism. In this context the State party refers to a statement made by the then Minister of Justice, Mr. Arpaillange, before the Senate characterizing the denial of the existence of the Holocaust as the contemporary expression of racism and anti-semitism.

8.9 In his comments of 11 July 1996 made on the State party's submission the author reiterates his earlier arguments, inter alia, he again challenges the "accepted" version of the extermination of the Jews because of its lack of evidence. In this context he refers for example to the fact that a decree ordering the extermination has never been found and it has never been proven how it was technically possible to kill so many people by gas-asphyxiation. He further recalls that visitors to Auschwitz have been made to believe that the gas chamber they see there is authentic, whereas the authorities know that it is a reconstruction, built on a different spot than the original is said to have been. He concludes that as a historian, interested in the facts, he is not willing to accept the traditional version of events and has no choice but to contest it.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes note of public debates in France, including negative comments made by French parliamentarians on the Gayssot Act, as well as of arguments put forward in other, mainly European, countries which support and oppose the introduction of similar legislations.

9.3 Although it does not contest that the application of the terms of the Gayssot Act, which, in their effect, make it a criminal offence to challenge the conclusions and the verdict of the International Military Tribunal at Nuremberg, may lead, under different conditions than the facts of the instant case, to decisions or measures incompatible with the Covenant, the Committee is not called upon to criticize in the abstract laws enacted by States parties. The task of the Committee under the Optional Protocol is to ascertain whether the conditions of the restrictions imposed on the right to freedom of expression are met in the communications which are brought before it.

9.4 Any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in subparagraphs 3 (a) and (b) of article 19, and must be necessary to achieve a legitimate purpose.

9.5 The restriction on the author's freedom of expression was indeed provided by law, i.e. the act of 13 July 1990. It is the constant jurisprudence of the Committee that the restrictive law itself must be in compliance with the provisions of the Covenant. In this regard, the Committee concludes, on the basis of the reading of the judgement of the 17th Chambre correctionnelle du Tribunal de grande instance de Paris, that the finding of the author's guilt was based on his following two statements: "... I have excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers ... I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest fabrication". His conviction therefore did not encroach upon his right to hold and express an opinion in general, rather the court convicted Mr. Faurisson for having violated the rights and reputation of others. For these reasons the Committee is satisfied that the Gayssot Act, as read, interpreted and applied to the author's case by the French courts, is in compliance with the provisions of the Covenant.

9.6 To assess whether the restrictions placed on the author's freedom of expression by his criminal conviction were applied for the purposes provided for by the Covenant, the Committee begins by noting, as it did in its General Comment 10, that the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of other persons or to those of the community as a whole. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under article 19, subparagraph 3 (a), of the Covenant.

9.7 Lastly the Committee needs to consider whether the restriction of the author's freedom of expression was necessary. The Committee noted the State party's argument contending that the introduction of the Gayssot Act was intended to serve the struggle against racism and anti-semitism. It also noted the statement of a member of the French Government, the then Minister of Justice, which characterized the denial of the existence of the Holocaust as the principal vehicle for anti-semitism. In the absence in the material before it of any argument undermining the validity of the State party's position as to the necessity of the restriction, the Committee is satisfied that the restriction of Mr. Faurisson's freedom of expression was necessary within the meaning of article 19, paragraph 3, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal a violation by France of article 19, paragraph 3, of the Covenant.

APPENDIX

A. Statement by Mr. Thomas Buergenthal

[Original: English]

As a survivor of the concentration camps of Auschwitz and Sachsenhausen whose father, maternal grandparents and many other family members were killed in the Nazi Holocaust, I have no choice but to recuse myself from participating in the decision of this case.

B. Individual opinion by Nisuke Ando *(concurring)*

[Original: English]

While I do not oppose the adoption of the Views by the Human Rights Committee in the present case, I would like to express my concern about the danger that the French legislation in question, the Gayssot Act, might entail. As I understand it, the act criminalizes the negation ("contestation" in French), by one of the means enumerated in article 23 of the Law on the Freedom of the Press of 1881, of one or several of the crimes against humanity in the sense of article 6 of the Statute of the International Military Tribunal of Nuremberg (see para. 4.2). In my view the term "negation" ("contestation"), if loosely interpreted, could comprise various forms of expression of opinions and thus has a possibility of threatening or encroaching the right to freedom of expression, which constitutes an indispensable prerequisite for the proper functioning of a democratic society. In order to eliminate this possibility, it would probably be better to replace the act with a specific legislation prohibiting well-defined acts of anti-semitism or with a provision of the criminal code protecting the rights or reputations of others in general.

C. Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein *(concurring)*

[Original: English]

1. While we concur in the view of the Committee that in the particular circumstances of this case the right to freedom of expression of the author was not violated, given the importance of the issues involved we have decided to append our separate, concurring, opinion.

2. Any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in subparagraphs 3 (a) and (b) of article 19, and it must be necessary to achieve that aim. In this case we are concerned with the restriction on the author's freedom of expression arising from his conviction for his statements in the interview published in Le Choc du Mois. As this conviction was based on the prohibition laid down in the Gayssot Act, it was indeed a restriction provided by law. The main issue is whether the restriction has been shown by the State party to be necessary, in terms of article 19, subparagraph 3 (a), for respect of the rights or reputations of others.

3. The State party has argued that the author's conviction was justified "by the necessity of securing respect for the judgement of the International Military Tribunal at Nuremburg, and through it the memory of the survivors and

the descendants of the victims of Nazism". While we entertain no doubt whatsoever that the author's statements are highly offensive both to Holocaust survivors and to descendants of Holocaust victims (as well as to many others), the question under the Covenant is whether a restriction on freedom of expression in order to achieve this purpose may be regarded as a restriction necessary for the respect of the rights of others.

4. Every individual has the right to be free not only from discrimination on grounds of race, religion and national origins, but also from incitement to such discrimination. This is stated expressly in article 7 of the Universal Declaration of Human Rights. It is implicit in the obligation placed on States parties under article 20, paragraph 2, of the Covenant to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The crime for which the author was convicted under the Gayssot Act does not expressly include the element of incitement, nor do the statements which served as the basis for the conviction fall clearly within the boundaries of incitement, which the State party was bound to prohibit, in accordance with article 20, paragraph 2. However, there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.

5. In the discussion in the French Senate on the Gayssot Act the then Minister of Justice, Mr. Arpaillange, explained that the said law, which, inter alia, prohibits denial of the Holocaust, was needed since Holocaust denial is a contemporary expression of racism and anti-semitism. Furthermore, the influence of the author's statements on racial or religious hatred was considered by the Paris Court of Appeal, which held that by virtue of the fact that such statements propagate ideas tending to revive Nazi doctrine and the policy of racial discrimination, they tend to disrupt the harmonious coexistence of different groups in France.

6. The notion that in the conditions of present-day France, Holocaust denial may constitute a form of incitement to anti-semitism cannot be dismissed. This is a consequence not of the mere challenge to well-documented historical facts, established both by historians of different persuasions and backgrounds as well as by international and domestic tribunals, but of the context, in which it is implied, under the guise of impartial academic research, that the victims of Nazism were guilty of dishonest fabrication, that the story of their victimization is a myth and that the gas chambers in which so many people were murdered are "magic".

7. The Committee correctly points out, as it did in its General Comment 10, that the right for the protection of which restrictions on freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of a community as a whole. This is especially the case in which the right protected is the right to be free from racial, national or religious incitement. The French courts examined the statements made by the author and came to the conclusion that his statements were of a nature as to raise or strengthen anti-semitic tendencies. It appears therefore that the restriction on the

author's freedom of expression served to protect the right of the Jewish community in France to live free from fear of incitement to anti-semitism. This leads us to the conclusion that the State party has shown that the aim of the restrictions on the author's freedom of expression was to respect the right of others, mentioned in article 19, paragraph 3. The more difficult question is whether imposing liability for such statements was necessary in order to protect that right.

8. The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in article 19, subparagraphs 3 (a) or (b) (the rights or reputations of others, national security, public order, public health or morals). The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value. As the Committee stated in its General Comment 10, the restriction must not put the very right itself in jeopardy.

9. The Gayssot Act is phrased in the widest language and would seem to prohibit publication of bona fide research connected with matters decided by the Nuremburg Tribunal. Even if the purpose of this prohibition is to protect the right to be free from incitement to anti-semitism, the restrictions imposed do not meet the proportionality test. They do not link liability to the intent of the author, nor to the tendency of the publication to incite to anti-semitism. Furthermore, the legitimate object of the law could certainly have been achieved by a less drastic provision that would not imply that the State party had attempted to turn historical truths and experiences into legislative dogma that may not be challenged, no matter what the object behind that challenge, nor its likely consequences. In the present case, we are not concerned, however, with the Gayssot Act, in abstracto, but only with the restriction placed on the freedom of expression of the author by his conviction for his statements in the interview in Le Choc du Mois. Does this restriction meet the proportionality test?

10. The French courts examined the author's statements in great detail. Their decisions, and the interview itself, refute the author's argument that he is only driven by his interest in historical research. In the interview the author demanded that historians "particularly Jewish historians" ("les historiens, en particulier juifs") who agree that some of the findings of the Nuremburg Tribunal were mistaken be prosecuted. The author referred to the "magic gas chamber" ("la magique chambre à gaz") and to "the myth of the gas chambers" ("le mythe des chambres à gaz"), that was a "dirty trick" ("une gredinerie") endorsed by the victors in Nuremburg. The author has, in these statements, singled out Jewish historians over others, and has clearly implied that the Jews, the victims of the Nazis, concocted the story of gas chambers for their own purposes. While there is every reason to maintain protection of bona fide historical research against restriction, even when it challenges accepted historical truths and by so doing offends people, anti-semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against restriction. The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were

intimately linked to the value they were meant to protect - the right to be free from incitement to racism or anti-semitism; protecting that value could not have been achieved in the circumstances by less drastic means. It is for these reasons that we joined the Committee in concluding that, in the specific circumstances of the case, the restrictions on the author's freedom of expression met the proportionality test and were necessary in order to protect the rights of others.

D. Individual opinion by Cecilia Medina Quiroga (*concurring*)

[Original: Spanish]

1. I concur with the Committee's opinion in this case and wish to associate myself with the individual opinion formulated by Ms. Evatt and Mr. Kretzmer as being the one that most clearly expresses my own thoughts.

2. I would like to add that a determining factor for my position is the fact that, although the wording of the Gayssot Act might, in application, constitute a clear violation of article 19 of the Covenant, the French court which tried Mr. Faurisson interpreted and applied that act in the light of the provisions of the Covenant, thereby adapting the act to France's international obligations with regard to freedom of expression.

E. Individual opinion by Rajsoomer Lallah (*concurring*)

[Original: English]

1. I have reservations on the approach adopted by the Committee in arriving at its conclusions. I also reach the same conclusions for different reasons.

2. It is perhaps necessary to identify, in the first place, what restrictions or prohibitions a State party may legitimately impose, by law, on the right to freedom of expression or opinion, whether under article 19, paragraph 3, or article 20, paragraph 2, of the Covenant; and, secondly, where the non-observance of such restrictions or prohibitions is criminalized by law, what are the elements of the offence that the law must, in its formulation, provide for so that an individual may know what these elements are and so that he may be able to defend himself, in respect of those elements, by virtue of the fundamental right to a fair trial by a Court conferred upon him under article 14 of the Covenant.

3. The Committee, and indeed my colleagues Evatt and Kretzmer, whose separate opinion I have had the advantage of reading, have properly analysed the purposes for which restrictions may legitimately be imposed under article 19, paragraph 3, of the Covenant. They have also properly underlined the requirement that the restrictions must be necessary to achieve those purposes. I need not add anything further on this particular aspect of the matter.

4. Insofar as restrictions or prohibitions in pursuance of article 20, paragraph 2, are concerned, the element of necessity is merged with the very nature of the expression which may legitimately be prohibited by law, that is to say, the expression must amount to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

5. The second question as to what the law must provide for, in its formulation, is a more difficult one. I would see no great difficulty in the formulation of a law which prohibits, in the very terms of article 20, paragraph 2, the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The formulation becomes more problematic for the purposes of article 19, paragraph 3. Because, here, it is not, as is the case under article 20, paragraph 2, the particular expression that may be restricted but rather the adverse effect that the expression must necessarily have on the specified objects or interests which subparagraphs 3 (a) and (b) are designed to protect. It is the prejudice to these objects or interests which becomes the material element of the restriction or prohibition and, consequently, of the offence.

6. As my colleagues Evatt and Kretzmer have noted, the Gayssot Act is formulated in the widest terms and would seem to prohibit publication of bona fide research connected with principles and matters decided by the Nuremberg Tribunal. It creates an absolute liability in respect of which no defence appears to be possible. It does not link liability either to the intent of the author nor to the prejudice that it causes to respect for the rights or reputations of others as required under article 19, subparagraph 3 (a), or to the protection of national security or of public order or of public health or morals as required under article 19, subparagraph 3 (b).

7. What is significant in the Gayssot Act is that it appears to criminalize, in substance, any challenge to the conclusions and the verdict of the Nuremberg Tribunal. In its effects, the Act criminalizes the bare denial of historical facts. The assumption, in the provisions of the Act, that the denial is necessarily anti-semitic or incites anti-semitism is a Parliamentary or legislative judgement and is not a matter left to adjudication or judgement by the Courts. For this reason, the Act would appear, in principle, to put in jeopardy the right of any person accused of a breach of the Act to be tried by an independent Court.

8. I am conscious, however, that the Act must not be read in abstracto but in its application to the author. In this regard, the next question to be examined is whether any deficiencies in the Act, in its application to the author, were or were not remedied by the Courts.

9. It would appear, as also noted by my colleagues Evatt and Kretzmer, that the author's statements on racial or religious hatred were considered by the French Courts. Those Courts came to the conclusion that the statements propagated ideas tending to revive Nazi doctrine and the policy of racial discrimination. The statements were also found to have been of such a nature as to raise or strengthen anti-semitic tendencies. It is beyond doubt that, on the basis of the findings of the French Courts, the statements of the author amounted to the advocacy of racial or religious hatred constituting incitement, at the very least, to hostility and discrimination towards people of the Jewish faith which France was entitled under article 20, paragraph 2, of the Covenant to proscribe. In this regard, in considering this aspect of the matter and reaching the conclusions which they did, the French Courts would appear to have, quite properly, arrogated back to themselves the power to decide a question which the Legislature had purported to decide by a legislative judgement.

10. Whatever deficiencies, therefore, which the Act contained were, in the case of the author, remedied by the Courts. When considering a communication under the Optional Protocol, what must be considered is the action of the State as such, irrespective of whether the State had acted through its legislative arm or its judicial arm or through both.

11. I conclude, therefore, that the creation of the offence provided for in the Gayssot Act, as it has been applied by the Courts to the author's case, falls more appropriately, in my view, within the powers of France under article 20, paragraph 2, of the Covenant. The result is that there has, for this reason, been no violation by France under the Covenant.

12. I am aware that the communication of the author was declared admissible only with regard to article 19. I note, however, that no particular article was specified by the author when submitting his communication. And, in the course of the exchange of observations by both the author and the State party, the substance of matters relevant to article 20, paragraph 2, were also mooted or brought in issue. I would see no substantive or procedural difficulty in invoking article 20, paragraph 2.

13. Recourse to restrictions that are, in principle, permissible under article 19, paragraph 3, bristles with difficulties, tending to destroy the very existence of the right sought to be restricted. The right to freedom of opinion and expression is a most valuable right and may turn out to be too fragile for survival in the face of the too frequently professed necessity for its restriction in the wide range of areas envisaged under subparagraphs 3 (a) and (b) of article 19.

F. Individual opinion by Prafullachandra Bhagwati (*concurring*)

[Original: English]

The facts giving rise to this communication have been set out in detail in the majority opinion of the Committee and it would be an idle exercise for me to reiterate the same over again. I will, instead, proceed straight away to deal with the question of law raised by the author of the communication. The question is whether the conviction of the author under the Gayssot Act was violative of article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

Article 19, paragraph 2, declares that everyone shall have the right to freedom of expression which includes freedom to impart information and ideas of all kinds through any media, but restrictions can be imposed on this freedom under article 19, paragraph 3, provided such restrictions cumulatively meet the following conditions: (a) they must be provided for by law, (b) they must address one of the aims enumerated in subparagraphs 3 (a) and 3 (b) of article 19 and (c) they must be necessary to achieve a legitimate purpose, this last requirement introducing the principle of proportionality.

The Gayssot Act was passed by the French Legislature on 13 July 1990 amending the law on the Freedom of the Press by adding an article 24 bis, which made it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945 on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945 and 1946. The Gayssot Act thus provided restriction on freedom of expression by making it an offence to speak or write denying the existence of the Holocaust or of gas asphyxiation of Jews in gas chambers by Nazis. The author was convicted for breach of the provisions of the Gayssot Act and it was therefore breach of this restriction on which the finding of guilt recorded against him was based. The offending statements made by the author on which his conviction was based were the following:

> "... No one will have me admit that two plus two make five, that the earth is flat or that the Nuremberg trial was infallible. I have excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber ..."
>
> "I would wish to see that 100 per cent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication ('est une gredinerie'), endorsed by the victorious powers of Nuremberg in 1945-46 and officialized on 14 July 1990 by the current French Government with the approval of the Court historians."

These statements were clearly in breach of the restriction imposed by the Gayssot Act and were therefore plainly covered by the prohibition under the Gayssot Act. But the question is whether the restriction imposed by the Gayssot Act, which formed the basis of the conviction of the author, satisfied the other two elements in article 19, paragraph 3, in order to pass the test of permissible restriction.

The second element in article 19, paragraph 3, requires that the restriction imposed by the Gayssot Act must address one of the aims enumerated in subparagraphs 3 (a) and (b) of article 19. It must be necessary (a) for respect of the rights or reputations of others or (b) for the protection of national security or of public order (ordre public) or of public health or morals. It would be difficult to bring the restriction under subparagraph 3 (b) because it cannot be said to be necessary for any of the purposes set out in subparagraph 3 (b). The only question to which it is necessary to address oneself is whether the restriction can be said to be necessary for respect of the rights and reputations of others so as to be justifiable under subparagraph 3 (a).

Now if a law were merely to prohibit any criticism of the functioning of the International Military Tribunal at Nuremberg or any denial of a historical event simpliciter, on pain of penalty, such law would not be justifiable under subparagraph 3 (a) of article 19 and it would clearly be inconsistent under article 19, paragraph 2. But it is clear from the submissions made by the State party and, particularly, the submission made on 3 July 1996, that the object and purpose of imposing restriction under the Gayssot Act on freedom of expression was to prohibit or prevent insidious expression of anti-semitism. According to the State party:

> "the denial of the Holocaust by authors who qualify themselves as revisionists could only be qualified as an expression of racism and the principal vehicle of anti-semitism."
>
> "the denial of the genocide of the Jews during World War Two fuels debates of a profoundly anti-semitic character, since it accuses the Jews of having themselves fabricated the myth of their extermination."

Thus, according to the State party, the necessary consequence of denial of extermination of Jews by asphyxiation in the gas chamber was fuelling of anti-semitic sentiment by the clearest suggestion that the myth of the gas chamber was a dishonest fabrication by the Jews and it was in fact so articulated by the author in his offending statement.

It is therefore clear that the restriction on freedom of expression imposed by the Gayssot Act was intended to protect the Jewish community against hostility, antagonism and ill-will which would be generated against them by statements imputing dishonest fabrication of the myth of gas chamber and extermination of Jews by asphyxiation in the gas chamber. It may be noted, as observed by the Committee in its General Comment 10, that the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, subparagraph 3 (a), may relate to the interests of other persons or to those of the community as a whole. Since the statement made by the author, read in the context of its necessary consequence, was calculated or was at least of such a nature as to raise or strengthen anti-semitic feelings and create or promote hatred, hostility or contempt against the Jewish community as dishonest fabricators of lies, the restriction imposed on such statement by the Gayssot Act was intended to serve the purpose of respect for the right and interest of the Jewish community to live free from fear of an atmosphere of anti-semitism, hostility or contempt. The second element required for the applicability of article 19, paragraph 3, was therefore satisfied.

That takes me to a consideration of the question whether the third element could be said to have been satisfied in the present case. Was the restriction on the author's freedom of expression imposed under the Gayssot Act necessary for respect of the rights and interests of the Jewish community? The answer must obviously be in the affirmative. If the restriction on freedom of expression in the manner provided under the Gayssot Act had not been imposed and statements denying the Holocaust and the extermination of Jews by asphyxiation in the gas chamber had not been made penal, the author and other revisionists like him could have gone on making statements similar to the one which invited the conviction of the author and the necessary consequence and fall-out of such statements would have been, in the context of the situation prevailing in Europe, promotion and strengthening of anti-semitic feelings, as emphatically pointed out by the State party in its submissions. Therefore, the imposition of restriction by the Gayssot Act was necessary for securing respect for the rights and interests of the Jewish community to live in society with full human dignity and free from an atmosphere of anti-semitism.

It is therefore clear that the restriction on freedom of expression imposed by the Gayssot Act satisfied all the three elements required for the applicability of article 19, paragraph 3, and was not inconsistent with article 19, paragraph 2, and consequently, the conviction of the author under the Gayssot Act was not violative of his freedom of expression guaranteed under article 19, paragraph 2. I have reached this conclusion under the greatest reluctance because I firmly believe that in a free democratic society, freedom of speech and expression is one of the most prized freedoms which must be defended and upheld at any cost and this should be particularly so in the land of Voltaire. It is indeed unfortunate that in the world of today, when science and technology have advanced the frontiers of knowledge and mankind is beginning to realize that human happiness can be realized only through interdependence and cooperation, the threshold of tolerance should be going down. It is high time man should realize his spiritual dimension and replace bitterness and hatred by love and compassion, tolerance and forgiveness.

I have written this separate opinion because, though I agree with the majority conclusion of no violation, the process of reasoning through which I have reached this conclusion is a little different from the one which has found favour with the majority.

J. Communication No. 552/1993; Wieslaw Kall v. Poland (Views adopted on 14 July 1997, sixtieth session)[*]

Submitted by: Wieslaw Kall

Victim: The author

State party: Poland

Date of communication: 31 March 1993 (initial submission)

Date of decision on admissibility: 5 July 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 1997,

Having concluded its consideration of Communication No. 552/1993 submitted to the Human Rights Committee by Mr. Wieslaw Kall under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[**]

1. The author of the communication, dated 31 March 1993, is Wieslaw Kall, a Polish citizen, residing in Herby, Poland. He claims to be a victim of a violation of article 2, paragraph 1, and article 25 (c) of the International Covenant on Civil and Political Rights. The Covenant entered into force for Poland on 18 March 1977. The Optional Protocol entered into force for Poland on 7 February 1992.

Facts as submitted by the author

2.1 The author was employed in various positions in the Civic Militia of the Ministry of Internal Affairs for 19 years, and from 1982 to 1990 as a cadre officer of the political and educational section, at the senior inspector level. He stresses that the Civic Militia was not identical with the Security Police, and that he never wore the uniform of the Security Police but only that of the Civic Militia. On 2 July 1990, he was retroactively reclassified as a security police officer and, on 31 July 1990, he was dismissed from his post, pursuant to the 1990 Protection of State Office Act, which dissolved the Security Police and replaced it by a new department.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[**] The text of an individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Christine Chanet, is appended to the present document.

2.2 Under the Act, a special Committee was established to decide on the applications of former members of the Security Police for positions with the new department. The author claims that he should not have been subjected to "verification" proceedings, because he had never been a security officer. In view of his leftist opinions and membership in the Polish United Workers' Party, his application was dismissed by the Provincial Qualifying Committee in Czestochowa. The Committee considered that the author did not meet the requirements stipulated for officers of the Ministry of Internal Affairs. The author appealed to the Central Qualifying Committee in Warsaw, which quashed the decision, on 21 September 1990, and held that the author could apply for employment within the Ministry of Internal Affairs.

2.3 However, the author's subsequent application for re-employment at the Provincial Police in Czestochowa was rejected on 24 October 1990. The author then complained to the Minister of Internal Affairs by letter of 11 March 1991. The Minister replied that the author had lawfully been dismissed from service, in the context of the reorganization of the department. In this connection, the Minister referred to regulation No. 53 of 2 July 1990, according to which officers who performed service on the Political and Educational Board were considered to be members of the Security Police.

2.4 On 16 December 1991, the author applied to the Administrative Court alleging unjustified dismissal and error in subjecting him to verification proceedings. On 6 March 1992, the Court dismissed his application, considering that it was not within its competence to hear appeals from Provincial Qualifying Committees.

Complaint

3. The author claims that he was dismissed without justification. He claims that his reclassification as a member of the Security Police was only implemented to facilitate his dismissal, as the law did not stipulate the termination of contracts of officers working in the Civic Militia. Moreover, he claims that he was subsequently denied access to public service only because of his political opinions, since he has been an active member of the Polish United Workers' Party and refused to hand back his membership card during the period of political changes within the Ministry. He claims that this constitutes discrimination in contravention of article 25 (c) of the Covenant.

Committee's decision on admissibility

4. On 25 October 1993, the communication was transmitted to the State party under rule 91 of the rules of procedure of the Human Rights Committee. No submission under rule 91 was received from the State party, despite a reminder addressed to it on 7 December 1994. By letter of 11 May 1995, the author confirmed that his situation remains unchanged.

5.1 At its fifty-fourth session, the Committee considered the admissibility of the communication. The Committee noted with regret the State party's failure to provide information and observations on the question of the admissibility of the communication.

5.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement. With respect to the exhaustion of domestic remedies, the Committee found that the author met the requirements of article 5, subparagraph 2 (b), of the Optional Protocol.

5.3 The Committee observed that the author alleged that he was denied access, on general terms of equality, to public service in his country, a claim which is admissible ratione materiae, in particular under article 25 (c) of the Covenant.

6. On 5 July 1995, the Human Rights Committee declared the communication admissible.

State party's submission and the author's comments thereon

7.1 By submission of 11 March 1996, the State party apologizes for its failure to provide observations in time on the admissibility of the communication. According to the State party, the delay was attributable to extensive consultations concerning the matter. The State party undertakes to cooperate fully with the Committee in the consideration of communications submitted under the Optional Protocol.

7.2 The State party provides information concerning the legal background of the facts of the communication. It explains that, following profound political transformation towards restoring representative democracy, it was necessary to reorganize the Ministry of Internal Affairs, in particular its political service sector. Parliament thus adopted a Police Act and a Protection of State Office Act, both of 6 April 1990. The Protection of State Office Act provided for the dissolution of the Security Police and the ex lege dismissal of its officers. The Police Act provided for the dissolution of the Civic Militia, but provided that its officers became ex lege officials of the Police. However, article 149 (2) makes exception for those Militia officers who, until 31 July 1989, were Security Police officers posted in the Militia. These officers were ex lege dismissed from their post. The changes became effective on 1 August 1990.

7.3 Under article 132 (2) of the Protection of State Office Act, the Council of Ministers issued ordinance No. 69 of 21 May 1990, providing for "verification proceedings" of the ex lege dismissed officers before a Qualifying Committee. An appeal was provided from negative assessments by the Regional Qualifying Committees to the Central Qualifying Committee. Upon application, the Committees examined whether the applicant fulfilled the requirements for officers of the Ministry of Internal Affairs as well as whether (s)he was a person of a high moral character. Those positively assessed were free to apply for a post within the Ministry.[20] The State party explains that the reorganization of the Ministry led to a substantial reduction of posts and a positive verification assessment was merely a condition necessary to apply for employment but did not guarantee placement.

7.4 On 2 July 1990, the Minister of Internal Affairs issued an order confirming which categories of posts were recognized as forming part of the Security Police. According to the order, officers employed until 31 July 1989 on posts of, inter alia, Head and Deputy Head of the Political and Educational Board were considered officers of the Security Police.

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[20] According to the State party, 10,349 of the former Security Police officers who applied for verification were positively assessed, while 3,595 received a negative assessment.

7.5 The State party further points out that employment under the Police Act and the Protection of the State Office Act is not regulated by the Labour Code, but by the Code of Administrative Procedure, an appointment being based on a special nomination and not on a labour contract. Interested parties can thus appeal decisions concerning their employment to the higher administrative authority. A decision on either admission or non-admission to the service of the Ministry of Internal Affairs may be appealed in highest instance to the High Administrative Court.

8.1 As regards the author's case, the State party points out that he started his public service in September 1971 in the Civic Militia, attended the Militia College from 1972 to 1977 and then served at the Regional Militia Headquarters at Czestochowa. On 16 January 1982, he became Deputy Head of the Regional Office of Internal Affairs in Lubliniec, responsible for the Political and Educational Board. Since 1 February 1990 he had served as senior inspector at the Regional Office of Internal Affairs at Czestochowa.

8.2 On 17 July 1990, the author submitted his application to the Regional Qualifying Board in Czestochowa with a request for employment in the police. According to the State party, this already shows that the author considered himself a Security Police officer, since, if he had just been a member of the militia, he would have had his employment automatically extended. The Regional Qualifying Committee issued a negative assessment of the author's case. However, on appeal, the Central Qualifying Committee quashed the assessment and stated that the author was eligible for employment in the Police or in other units of the Ministry of Internal Affairs.

8.3 Consequently, on 3 October 1990, the author submitted his application for employment to the Regional Police Headquarters in Czestochowa. On 24 October 1990, the Regional Police Commander informed him that "he did not avail himself" of his employment offer. The State party points out that the author could have appealed this refusal to nominate him to the Police Chief Commander. The author failed to do so, but instead, on 11 March 1991, complained to the Minister of Internal Affairs that he had been unjustly subjected to the "verification procedure". The Minister replied that the procedure had been legal and that his dismissal could not be reviewed. Further, on 16 December 1991, the author complained to the High Administrative Court to request a change of the assessment done by the Regional Qualifying Committee. On 6 March 1992, the Court rejected the author's claim, since it was incompetent to hear complaints against the Qualifying Committees as they were not administrative organs.

9.1 The State party requests the Committee to reconsider its decision declaring the communication admissible. The State party submits that the Covenant entered into force for Poland on 18 March 1977 and its Optional Protocol on 7 February 1992 and thus contends that the Committee can only consider communications concerning alleged violations of human rights which occurred after the Protocol's entry into force for Poland. Since the author's verification procedure was terminated on 21 September 1990 with the decision by the Central Qualifying Committee that he was eligible for employment in the Ministry, and the author was refused employment on 24 October 1990, the State party argues that his communication is inadmissible ratione temporis. In this connection, the State party explains that the author could have appealed the refusal of employment within 14 days to a higher authority. Since he failed to do so, the decision of 24 October 1990 became final. The State party argues that the author's complaints to the Minister and to the High Administrative

Court should not be taken into account, since they were not legal remedies to be exhausted.

9.2 The State party is of the opinion that there is no reason in the present case to resort to retroactive application of the Optional Protocol, as elaborated by the Committee's jurisprudence. The State party denies that the alleged violations have a continuing character, and refers to the Committee's decision in Communication No. 520/1992[21] that a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or clear implication, of the previous violations of the State party.

9.3 As regards the exhaustion of domestic remedies, the State party refers to rule 90 (1) (f) of the Committee's rules of procedure that the Committee shall ascertain that the individual has exhausted all available domestic remedies. The State party refers to the legal background to the case and argues that the remedy available to the author for the refusal of employment was an appeal to the Police Chief Commander and, if necessary, subsequently to the High Administrative Court. The author chose not to avail himself of these remedies and instead submitted a complaint to the Minister of Internal Affairs. According to the State party, this complaint cannot be considered a remedy, since it did not concern the refusal of employment, but the qualifying procedure. Similarly, the appeal to the High Administrative Court concerning the qualification by the Regional Qualifying Committee was not the proper remedy to be exhausted by the author. The State party therefore argues that the communication is inadmissible for non-exhaustion of domestic remedies.

10.1 As regards the merits of the communication, the State party notes that the author claims that he was groundlessly denied employment in the new Police and that his classification as a former Security Police officer was but a pretext to dismiss him on the ground of his political opinions. The State party contends that the author has not substantiated that his party membership and political opinions were the reason for his dismissal or his denial of employment. The State party refers to the applicable legislation and notes that the author was dismissed ex lege from his post together with others holding similar posts. The State party emphasizes that it was a lawful and legitimate decision of Parliament to dissolve the Security Police. It adds that the Minister's order of 2 July 1990 was no more than a specification of posts required under the legislation, and did not change the existing classification of posts.

10.2 The State party explains that both the Security Police and the Civic Militia were part of the Ministry of Internal Affairs. According to the State party, at regional and district levels of the administration for internal affairs special sections of the Security Police existed headed by an officer with rank of Deputy Head of Regional or District Office for Internal Affairs. The author held a post of Deputy Head of the Regional Office of Internal Affairs responsible for the Political and Educational Board. According to the State party, there is no doubt that this post was a component part of the Security Police. The Protection of State Office Act was thus correctly applied to him and consequently the author lost his post ex lege. The State party adds that the type of education or the uniform worn by officers are not decisive for their classification.

10.3 As regards the refusal to re-employ the author in the Police, the State party argues that decisions regarding employment remain largely within the discretion and appreciation of the employer. Further, the employer is dependent on the number of available vacant posts. The State party refers to the travaux préparatoires of article 25 (c) and notes that its intention was to prevent the monopolization of the State apparatus by privileged groups, but that it was agreed that States must have possibilities of establishing certain criteria of admitting its citizens to public service. The State party points out that in dissolving the Security Police, ethical and political reasons played a role. In this connection, it refers to the view expressed by the Committee of Experts of the Council of Europe that the selection of public servants for key administrative positions could be made according to political aspects.

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[21] E. and A. K. v. Hungary, declared inadmissible on 7 April 1994.

10.4 The State party further notes that the rights in article 25 are not absolute, but allow reasonable restrictions compatible with the purpose of the law. The State party is of the opinion that organizational changes in the Police and the Protection of State Office, combined with the number of available posts, sufficiently justifies the reasons for denying the author employment in the Police. Moreover, the State party argues that article 25 (c) does not oblige the State to guarantee a post in public service. In the State party's view, the article obliges States to establish transparent guarantees, especially of a procedural nature, for equal opportunities of access to public service. The State party submits that Polish law has established these guarantees, as outlined above. The State party contends therefore that the author's right under article 25 (c) has not been violated.

11.1 In his reply to the State party's submission, the author reiterates that he has never been a member of the Security Police but that he has always served in the structures of the Civic Militia. He maintains that there is no order in his personal file to show that he became a member of the Security Police. In the author's opinion the Minister's order of 2 July 1990 was arbitrary and retroactively classified him as a Security Police officer. In this connection, the author points out that according to the circular of the Ministry of Internal Affairs, before the order of 2 July 1990, the following posts were considered to belong to the Security Police: all those in Departments I and II, the Security Police staff operations group, Ministry advisers, intelligence and counter-intelligence secretariat, Deputy Chiefs of Provincial Security Police, and Chiefs and Senior Specialists for the Security Police in the Provincial Offices of the Ministry of Internal Affairs. The author submits that it is clear from this that his post was not part of the Security Police.

11.2 The author refers to a report from the Ombudsman of 1993, where the Ombudsman found that the retroactive classification of officers as members of the Security Police had been illegal. He also refers to remarks made by Members of Parliament in 1996, that it had been a mistake if militiamen who had never been members of the Security Police had been forced to undergo the verification procedures.

11.3 The author does not challenge the State party's assertion that the Security Police was abolished lawfully. However, he claims that the verification procedures established by the act and by the Minister's order were illegal and arbitrary.

11.4 As regards the exhaustion of domestic remedies, the author states that until now he has not received any legally binding documents which would ascertain on what grounds he was dismissed from service. He did not receive a dismissal order, nor was he instructed about the possibilities of appeal. He states that he submitted a complaint to the Minister of Internal Affairs, because he did not know to whom to turn, and expected the Minister to redirect his complaint to the appropriate authority, pursuant to article 65 of the Code of Administrative Proceedings. He further submits that he complained to the High Administrative Court as soon as he learned from the press that such a recourse was possible. Because of lack of legal advice, however, he filed the complaint against the Qualifying Committee's decision, not against the refusal to employ him.

11.5 As regards the verification procedure, the author states that he was given the choice between participating in it or being dismissed. He contests that by submitting himself to the verification procedure he showed that he considered himself a Security Police member. In this connection, he points out that on the form, where it said "application by a former Security Police functionary", he crossed out the words "Security Police" and replaced them with "Civic Militia".

11.6 As to the merits, the author states that he is convinced that if he had been a good Catholic, he would certainly be a police officer now. Since he was considered eligible by the Central Qualifying Committee, he does not see why he was not offered a job with the Police, if not for his service in the communist party and his political opinions. In this context, he states that a colleague was recommended by the Bishop of Czestochowa to the position of Police Regional Commander and was accepted.

Review of admissibility

12. The Committee notes the State party's claim that the communication is inadmissible ratione temporis and also for non-exhaustion of domestic remedies. The Committee has examined the relevant information made available by the State party. However, the Committee has also examined the information submitted by the author in this respect and concludes that the facts and arguments as advanced by the State party in support of its claim do not justify the revision of the Committee's decision on admissibility.

Examination of the merits

13.1 The question before the Committee is whether the author's dismissal, the verification proceedings and the subsequent failure to employ him in the Police Force violated his rights under article 25 (c) of the Covenant.

13.2 The Committee notes that article 25 (c) provides every citizen with the right and the opportunity, without any distinctions based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and without unreasonable restrictions to have access, on general terms of equality, to public service in his country. The Committee further observes, however, that this right does not entitle every citizen to obtain guaranteed employment in the public service.

13.3 The Committee notes that the author has claimed that he was unlawfully dismissed, since he was not a member of the Security Police. The Committee observes, however, that the author was retroactively reclassified as a Security Police officer on 2 July 1990; it was as a consequence of the dissolution of the Security Police effected by the Protection of State Office Act that the author's post as Security Police officer was eliminated, resulting in his dismissal on 31 July 1990. The Committee notes that the author was not singled out for retroactive reclassification of his post, but that posts of others in positions similar to the author in different regional districts were also retroactively reclassified in the same manner. The reclassification was part of a process of comprehensive reorganization of the Ministry of Internal Affairs, with a view to restoring democracy and the rule of law in the country.

13.4 The Committee notes that the termination of the author's post was the result of the dissolution of the Security Police by the Protection of State Office Act and by reason of the dissolution of the Security Police, the posts of all members of the Security Police were abolished without distinction or differentiation.

13.5 Moreover, as regards the author's complaint about the verification procedure to which he was subjected, the Committee notes that, on appeal, the author was found to be eligible for a post in the Police. Thus, the facts reveal that the author was not precluded from access to the public service at that stage.

13.6 The question remains whether the fact that the author was not given a post in the Police constitutes sufficient evidence to conclude that he was refused because of his political opinions or whether said refusal was a consequence of the limited number of posts available. As reflected above, article 25 (c) does not entitle every citizen to employment within the public service, but to access on general terms of equality. The information before the Committee does not sustain a finding that this right was violated in the author's case.

14. The Committee concludes that the facts before it do not disclose a violation of any of the provisions of the Covenant.

APPENDIX

Individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Christine Chanet (*dissenting*)

[Original: English]

In this case, the author has argued a violation of article 25 (c) of the Covenant because he was unreasonably dismissed from the Civic Militia. The Committee has found that the State did not violate the Covenant. We cannot agree with this finding on the basis of the following facts and reasons:

1. A Polish law of 6 April 1990 dissolved the Security Police and de lege dismissed all its members. It is a fact that the dissolution of the Security Police was made because of ethical and political reasons, as stated by the State itself (para. 10.3). This law did not affect the author, since he was not a member of the Security Police.

By further Ordinance No. 69 of 21 May 1990 all members of the dissolved Security Police were subjected to a process of verification which, if approved, would enable them to apply for new jobs in units of the Ministry of Internal Affairs.

A subsequent Order of 2 July 1990 of the Minister of Internal Affairs gave a list of positions which would be considered to belong to the Security Police, among which the author's position was found. There was no domestic remedy to appeal that order (para. 8.3).

2. The State argues that the author was dismissed from his post ex lege, since there was no doubt that the author's post was a component part of the Security Police (paras. 10.1 and 10.2). However, the law was not enough to dismiss the author from his post, as a further Ministerial Order was needed. It is hardly conceivable, thus, that there was no doubt that the author belonged to the Security Police, what leads us to conclude that the author was not dismissed from his post ex lege.

This being the case, we must start from the premise that the author was dismissed by the Ministerial Order of 2 July 1990, and consequently it has to be examined whether the classification of the author's position as part of the Security Police was both a necessary and proportionate means for securing a legitimate objective, namely the re-establishment of internal law enforcement services free of the influence of the former regime, as the State party claims, or whether it was unlawful or arbitrary and or discriminatory, as the author claims. It is clear from the mere enunciation of the issue that there is a significant issue here, arising under article 25 (c) and that it was a question the author should have been able to raise through the exercise of a remedy allowing him to challenge the Order.

3. This leads to the examination of whether article 2, paragraph 3, of the Covenant was complied with by Poland with regard to the author. Under article 2, paragraph 3, of the Covenant, States parties undertake to ensure that any person whose rights are violated shall have an effective remedy for that violation. The Committee has taken the view so far that this article cannot be found to have been violated by a State unless a corresponding violation of another right under the Covenant has been

determined. We do not think this is the proper way to read article 2, paragraph 3.

It has to be taken into account that article 2 is not directed to the Committee, but to the States; it spells out the obligations the States undertake to ensure that rights are enjoyed by the people under their jurisdiction. Read that way it does not seem to make sense that the Covenant should tell the States parties that only when the Committee has found that a violation has occurred they should have provided for a remedy. This interpretation of article 2, paragraph 3, would render it useless. What article 2 intends is to set forth that whenever a human right recognized by the Covenant is affected by the action of a State agent there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation. This interpretation is in accordance with the whole rationale underlying the Covenant, namely that it is for the States parties thereto to implement the Covenant and to provide suitable ways to remedy possible violations committed by States organs. It is a basic principle of international law that international supervision only comes into play when the State has failed in its duty to comply with its international obligations.

Consequently, since the author had no possibility to have his claim heard that he had been dismissed arbitrarily and on the basis of political considerations, a claim which on the face of it raised an issue on the merits, we are of the opinion that in this case his rights under article 2, paragraph 3, were violated.

K. Communication No. 558/1993; Giosue Canepa v. Canada (Views adopted on 3 April 1997, fifty-ninth session)[*]

Submitted by:	Giosue Canepa [represented by Ms. B. Jackman]
Victim:	The author
State party:	Canada
Date of communication:	16 April 1993 (initial submission)
Date of decision on admissibility:	13 October 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1997,

Having concluded its consideration of Communication No. 558/1993 submitted to the Human Rights Committee on behalf of Mr. Giosue Canepa under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[**]

1. The author of the communication, dated 16 April 1993, is Giosue Canepa, an Italian citizen, at the time of submission of the communication under deportation order in Canada. He claims to be a victim of a violation by Canada of article 7, article 12, paragraph 4 and articles 17 and 23, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author was born in Italy in January 1962; at the age of five, he emigrated to Canada with his parents. After the family settled in Canada, a younger brother was born, who is Canadian by birth. The author has extended family in Italy, knows some Italian, but does not feel any meaningful connection with the country.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Ms. Laure Moghaizel, Mr. Julio Prado Vallejo, Mr. Martin Scheinin and Mr. Maxwell Yalden.

[**] The text of three individual opinions signed by four Committee members is appended to the present document.

2.2 For most of his life, the author considered himself to be a Canadian citizen. It was only when he was contacted by immigration officials because of his criminal convictions that he realized that he was a permanent resident. Between 1978 and 1987, the author was convicted on 37 occasions, mostly related to breaking and entering, theft, or possession of narcotics. On several occasions, he was sentenced to imprisonment. Counsel notes that the author's convictions are attributable to her client's addiction to heroin which he developed at the age of 13. He has no record of violence. Counsel notes that the author received no drug rehabilitation treatment while in prison, but on his own initiative attempted in 1988 to overcome his addiction. He was able to remain drug-free until 1990, when he became depressed over his immigration situation and returned to drug use. In 1990, he was again convicted of possession of a narcotic and imprisoned for 18 months. After his release in January 1993 he resumed living at home with his parents and his brother. He was still addicted to heroin and committed further offences shortly after his release; he was convicted on further charges of breaking and entering and was serving a one-year prison term at the time of the submission of the communication.

2.3 On 1 May 1985, the author was ordered deported on the basis of his criminal convictions. The author appealed the deportation order to the Immigration Appeal Board. The Board heard his appeal on 25 February 1988 and dismissed it by judgement of 30 March 1988. On 26 April 1988, the author petitioned the Federal Court of Appeal for leave to appeal of the decision of the Immigration Appeal Board. On 31 August 1988 leave to appeal was granted. The Federal Court of Appeal heard the appeal on 25 May 1992 and dismissed it by judgement of 8 June 1992. On 1 October 1992, the author applied to the Supreme Court of Canada for leave to appeal of the decision of the Federal Court of Appeal. The Supreme Court of Canada dismissed the application for leave to appeal on 21 January 1993. Thus, no further domestic remedy is said to be available.

2.4 It is stated that, after deportation, the author is not able to return to Canada without the express consent of the Minister of Immigration. A reapplication for immigration to Canada would not only require ministerial consent but also that the author meet all other criteria for immigrants. Because of his convictions, the author would be barred from readmission to Canada under section 19 (2) (a) of the Immigration Act.

3.1 On 2 June 1994, counsel to the author informs the Committee that the author has completed his prison sentence and that his deportation is imminent. She requests the Committee to request the State party, under rule 86 of its rules of procedure, not to remove the author from Canada while his communication is under consideration by the Committee. It is submitted that the author's deportation will make the author's rehabilitation next to impossible and that without a guarantee from the Canadian Government that the author will be allowed to return to Canada, should the Committee find that the deportation constitutes a violation of his rights, the deportation appears to be irrevocable.

3.2 On 7 June 1994, counsel to the author informed the Committee that, on 6 June 1994, the author was removed from Canada to Rome, Italy. According to counsel, the author had been informed of the date and time of his removal a few hours before the removal was to take place. This made it impossible for him to get his belongings and money from his family, allegedly contrary to normal procedure. Counsel requests the Committee to request the State party to return the author to Canada, awaiting the outcome of the examination of his communication under the Optional Protocol. It is submitted that the author's mental health will deteriorate if he is to stay in Italy, a country with which he is not familiar and where he feels isolated, and that this will cause him irreparable harm.

Complaint

4.1 The author claims that the facts as described reveal violations of article 7, 17 and 23, paragraph 3, of the Covenant, as interpreted in the light of articles 9, 12 and 13 of the Covenant. He claims that in respect of articles 17 and 23, the State party has failed to provide for clear legislative recognition of the protection of privacy, family and home life of persons in the author's position. In the absence of such legislation which ensures that family interests would be given due weight in administrative proceedings such as, for example, those before the Immigration Appeal Board, he claims there is a prima facie issue as to whether Canadian law is compatible with the requirement of protection of the family. The author also refers to the Committee's General Comment 15 ("The position of aliens under the Covenant"), according to which aliens may enjoy the protection of the Covenant even in relation to entry or residence, when considerations of respect for family life arise. The author furthermore refers to the Committee's General Comment on article 17, according to which States have a positive obligation to ensure respect for the right of every person to be protected against arbitrary or unlawful interference with her privacy, family and home.

4.2 The author argues that his right to family life is violated by his deportation, since his deportation separates him from his nuclear family in Canada, consisting of his father, mother and brother, a household unit of which the unmarried author has always been a part.

4.3 The author further submits that his rights to "privacy" and "home" have been violated. It is argued that the term "home" must be interpreted broadly and that it should encompass the community of which an individual is a part. In this sense, his "home" is said to be Canada. It is further argued that the author's right to privacy includes being able to live within this community without arbitrary or unlawful interference. To the extent that Canadian law does not protect aliens against such interference, the author claims a violation of article 17.

4.4 The author further argues that articles 17 and 23, paragraph 1, have been violated in his case, because the interference with his family and home, resulting from his deportation, is arbitrary. According to the author, the deportation of long-term, deeply rooted and substantially connected resident aliens who have already been duly punished for their crimes is not related to a legitimate State interest. In this connection, the author asserts that the word "arbitrary" in article 17 should be interpreted in the light of articles 4, 9, 12 and 13 of the Covenant. He argues that "arbitrary interference" within the meaning of article 17 of the Covenant is interference which is not "necessary to protect national security, public order, public health or morals or rights and freedoms of others" or is not "consistent with other rights recognized in the Covenant".

4.5 The author contends that article 12, paragraph 4, which recognizes everyone's right to enter his own country, is applicable to his situation since, for all practical purposes, Canada is his "own country". His deportation from Canada results in a statutory bar from re-entering Canada. In this context, it is pointed out that article 12, paragraph 4, indicates that everyone has the right to enter "his own country", not just his country of nationality or birth. It is submitted that Italy is not the author's own country, as he left it at the age of five and his entire life is centred around his family in Canada - thus, although not Canadian in a formal sense, he must be considered a de facto Canadian citizen.[22]

4.6 Finally, the author contends that the enforcement of the deportation order amounts to cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant. He acknowledges that the Committee has not yet considered whether the permanent separation of an individual from his family and close relatives and the effective banishment of a person from the only country which he ever knew and in which he grew up can amount to cruel, inhuman or degrading treatment; he submits, however, that this issue should be considered on the merits.[23]

4.7 In this connection, the author recalls that (a) he has been residing in Canada since the age of five; (b) at the time of deportation all the members of his immediate family resided in Canada; (c) while his criminal record is extensive, it does not reveal that he is a person who poses a danger to the public safety since he never committed crimes of violence; (d) although drug rehabilitation was part of some of his sentences, he received no such treatment while imprisoned and was actually able to obtain heroin in prison; (e) the deportation from Canada has effectively severed all his ties with Canada; and (f) the prison terms for his various convictions already constitute adequate and sufficient punishment and the deportation amounts to the imposition of additional punishment.

State party's comments on admissibility

5. By submission of 21 July 1994, the State party informs the Committee that it has no comments to offer on the issue of admissibility of the communication. It reserves the right to make submissions on the merits of the communication, should the Committee declare the communication admissible.

Committee's decision on admissibility

6.1 At its fifty-second session, the Human Rights Committee considered the admissibility of the communication.

6.2 The Committee noted that it was uncontested that there were no further remedies for the author to exhaust, and that the requirements of article 5, subparagraph 2 (b), of the Optional Protocol had been met.

6.3 The Committee noted that some of the author's claims under article 17 of the Covenant concerned the absence of legislation in Canada to guarantee the protection of the family life of permanent residents against whom an immigration inquiry is initiated with a view of ordering their deportation. The Committee recalled that it cannot, under the Optional Protocol procedure, examine in abstracto whether a State party has complied with its obligations under the Covenant.[24] To the extent that the author's claims referred to the failure of the Canadian legislature to guarantee the family life of non-Canadian residents in general, his communication was therefore inadmissible.

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[22] In this context, counsel refers to the Committee's decision in Lovelace v. Canada, in which the fact that the complainant was not recognized as an Indian under Canadian legislation did not prevent the Committee from considering the complainant to belong to the minority concerned and to benefit from the protection of article 27 of the Covenant. Counsel also refers to the judgement of the European Court of Human Rights in the Beldjoudi case (55/1990/246, 26 March 1992).

[23] Counsel refers to the separate opinion of Judge De Meyer of the European Court of Human Rights in the Beldjoudi case, in which it was stated that the removal of the applicant from his country of residence and the severance of the ties with his wife and family would amount to inhuman treatment.

6.4 The Committee considered that the author's claims that his deportation makes him a victim of a violation of article 7, article 12, paragraph 4, and articles 17 and 23 of the Covenant, should be considered on the merits.

7. As regards counsel's request under rule 86 of the Committee's rules of procedure, the Committee found that the author's deportation to Italy could not be considered to constitute "irreparable damage" in respect of the rights the author considers violated by his deportation. Should the Committee find in favour of the author and conclude that his deportation was contrary to the Covenant, the State party would be under an obligation to allow the author to re-enter Canada. Accordingly, the consequences of the deportation, however disagreeable they might be for the author in his situation, did not cause "irreparable damage" to the author in the enjoyment of his rights, which would have justified the granting of interim protection under rule 86 of the Committee's rules of procedure.

8. Accordingly, on 13 October 1994, the Human Rights Committee decided that the communication was admissible insofar as it appeared to raise issues under article 7, article 12, paragraph 4, and articles 17 and 23 of the Covenant.

State party's observations on the merits and counsel's comments thereon

9.1 By submission of 21 December 1995, the State party argues that the author's allegations in respect to article 7 of the Covenant are not substantiated, since there is no evidence that the author's separation from his family poses any particular risk to his mental or physical health. The State party argues that article 7 is not as broad in scope as contended by the author and does not apply to the present situation, where the author does not face a substantial risk of torture or of serious abuse in the receiving country. The author has not shown that he will suffer any undue hardship as a result of his deportation. The State party adds that the author is not absolutely barred from returning to Canada. Furthermore, the author's family is apparently able to join the author in Italy, as indicated by the author's father at the Immigration Appeal Board hearing. The State party argues that the question of separation from family is rather an issue to be dealt with under articles 17 and 23 of the Covenant.

9.2 The State party argues that the author has never acquired an unconditional right to remain in Canada as his "own country" and cannot acquire such status by virtue only of long-term residence in Canada. The State party contends that a definition of "own country" other than that of country of nationality would seriously erode the ability of States to exercise their sovereignty through border control and citizenship access requirements. According to the State party, this interpretation is supported by article 13 of the Covenant, from which can be inferred that there is no class of aliens that enjoys an unconditional right to stay in Canada. Moreover, the State party argues that if the Committee were to decide that article 12 may provide a right to permanent residents to return or remain in their country of residence, such a right must be dependent on the retention of legal status. The author thus has lost this right when he lost his permanent residence status.

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[24] See, inter alia, the Committee's decisions with respect to Communication No. 61/1979 (Hertzberg et al. v. Finland, Views adopted on 2 April 1982, para. 9.3) and Communication No. 163/1984 (C. et al. v. Italy, declared inadmissible on 10 April 1984, para. 6.2).

9.3 The State party further submits that the rights contained in articles 17 and 23 of the Covenant are not absolute and are to be balanced against societal interests. The Immigration Appeal Board considered all relevant factors and weighed the author's rights against the risk that he posed to the Canadian public. The Board noted that the author's community ties were not particularly compelling and concluded that the individual concerns of the author were overtaken by the larger societal interests. The length of the author's residence in Canada was duly considered and weighed in the balance.

9.4 If the Committee would find that articles 12, 17 and 23 do apply to the author's situation, the State party argues moreover that there is no evidence that the author has been arbitrarily deprived of his rights. The actions taken by the immigration officials were authorized by statute and the author was at all times afforded full procedural safeguards. The decision taken in the author's case was the result of a legal process that provided him with a full hearing and complied with both natural justice requirements and the requirements of the Canadian Charter of Rights and Freedoms.

10.1 In her comments on the State party's submission, counsel for the author maintains that the author's deportation, resulting in separation from his social and familial network amounts to cruel, inhuman and degrading treatment within the context of article 7 of the Covenant. In this connection, counsel emphasizes the author's dependency on heroin and the general recognition that family and social ties are crucial aspects of successful rehabilitation.

10.2 As regards article 12, paragraph 4, counsel explains that the issue is not whether or not the author ought to be considered a national or a citizen of Canada, but whether article 12 applies to his circumstances. In this context, counsel submits that States have imposed limits on their sovereignty through ratification of international treaties, such as the Covenant. Counsel refers to the travaux préparatoires, which give the impression that the meaning of "his own country" was left undefined by the drafters. Because of this, it is open to the Committee to interpret the provision in a manner which best ensures that human rights of a person are protected. Counsel is of the opinion that the State party's argument that if there is a right for permanent residents under article 12, such right must be dependent on the retention of the status, negates the rights under article 12 entirely. In this connection, counsel argues that Covenant rights cannot depend on the internal laws of the State.

10.3 As regards the balancing of interests, counsel acknowledges that the author's interests were balanced against those of Canadian society, but argues that under Canadian law there is no recognition of individual rights in the removal process, whereas the right of the State to deport is recognized. Counsel further submits that in the decision-making process family integrity is not a relevant consideration, but only economic dependency.

10.4 Counsel states that for all practical purposes, the author is barred from returning to Canada, since the Minister would not give his consent in the light of the Immigration Appeals Board's decision. Furthermore, the author cannot apply as a regular immigrant because of his criminal record, and even if he could, he would not qualify for admission under the selection criteria.

10.5 As regards the question whether the interference with the author's rights were arbitrary or not, counsel argues that since the Immigration Act applied to the author is inconsistent with the provisions, aims and objectives of the Covenant in the absence of recognition of family integrity as a justiciable issue, the decision taken in the author's case is unlawful. In this connection, counsel also argues that although due process in the procedural sense exists it does not in the substantive sense. Counsel submits that in the circumstances of the author's case, in particular his drugs dependency, the interference with his right to home and family life was arbitrary and constitutes a violation. In this connection, it is stated that the author's family did in fact remain in Canada after the author's deportation.

Issues and proceedings before the Committee

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The author has claimed that his removal from Canada constituted a violation of article 7 of the Covenant, since the separation of his family amounts to cruel, inhuman and degrading treatment. On the basis of the material before it, the Committee is of the opinion that the facts of the instant case are not of such a nature as to raise an issue under article 7 of the Covenant. The Committee concludes that there has been no violation of article 7 of the Covenant in the instant case.

11.3 As to the author's claim that his expulsion from Canada violates article 12, paragraph 4, of the Covenant, the Committee recalls that in its prior jurisprudence,[25] it expressed the view that a person who enters a State under the State's immigration laws, and subject to the conditions of those laws, cannot regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality. No such circumstances arose in the prior case the Committee dealt with, nor do they arise in the present case. The author was not impeded in acquiring Canadian citizenship, nor was he deprived of his original citizenship arbitrarily. In the circumstances, the Committee concludes that the author cannot claim that Canada is his own country, for purposes of article 12, paragraph 4, of the Covenant.

11.4 As regards the author's claim under article 17 of the Covenant, the Committee observes that the author's removal from Canada did interfere with his family life and that this interference was in accordance with Canadian law. The issue for the Committee to examine is whether the interference was arbitrary. The Committee has noted the State party's argument that the decision to remove the author from Canada was not taken arbitrarily as the author had a full hearing with procedural safeguards and his rights were weighed against the interests of society. The Committee observes that arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant. The separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal.

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[25] Communication No. 538/19993 (Stewart v. Canada), Views adopted on 1 November 1996, para. 12.2 to 12.9.

11.5 The circumstances are that the author has committed many offences, largely of the break, enter and steal kind, and mostly committed to get money to support his drug habit. His removal is seen as necessary in the public interest and to protect public safety from further criminal activity by the author. He has had an almost continuous record of convictions (except for a period from 1987 to 1988), from age 17 to his removal from Canada at age 31. The author, who has neither spouse nor children in Canada, has extended family in Italy. He has not shown how his deportation to Italy would irreparably sever his ties with his remaining family in Canada. His family were able to provide little help or guidance to him in overcoming his criminal tendencies and his drug-addiction. He has not shown that the support and encouragement of his family is likely to be helpful to him in the future in this regard, or that his separation from his family is likely to lead to a deterioration in his situation. There is no financial dependence involved in his family ties. There appear to be no circumstances particular to the author or to his family which would lead the Committee to conclude that his removal from Canada was an arbitrary interference with his family, nor with his privacy or home.

11.6 Finally, the Committee is of the opinion that the facts of the case do not raise an issue under article 23 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the provisions of the Covenant.

APPENDIX

A. Individual opinion by Committee member Martin Scheinin (*concurring*)

[Original: English]

While I share the Committee's view that there was no violation of the author's rights, I wish to explain my reasoning for such a conclusion.

As regards the alleged violation of article 12, paragraph 4, I have difficulties in accepting the majority reasoning in Communication No. 538/1993 (Stewart v. Canada), decided prior to my term as a member of the Committee. In my opinion, there are situations in which a person is entitled to protection both as an alien (i.e. a non-citizen) under article 13 and because the country of residence being understood as his or her "own country" under article 12, paragraph 4. In paragraph 11.3 of the present case, reference is made to the Views in Stewart, which, in my opinion, give too narrow a picture of situations in which a non-citizen is to be understood to reside in his or her "own country". Besides a situation in which there are unreasonable impediments on the acquisition of nationality, as mentioned in the Views, the same conclusion must, in my opinion, be made in certain other situations as well, for instance, if the person is stateless or if it would be impossible or clearly unreasonable for him or her to integrate into the society corresponding to his or her de jure nationality. Just to take one illustrative example, for a blind or deaf person who knows the language used in the country of residence but not the language of his or her nationality country, the country of residence should be interpreted as the person's "own country" under article 12, paragraph 4.

As to whether there was a violation of the author's rights under article 17, I likewise concur in a finding of non-violation. In addition to the factors mentioned in paragraph 11.5 of the Views, I emphasize that the deportation of the author did not in itself mean that his contacts with his family members in Canada were made impossible. If the author, aged 32 at the time of deportation, and his parents and brother in Canada wish to maintain those contacts, they can do so by correspondence, by telephone and by the other family members visiting Italy, the country of origin of the parents. In due course, the author may also apply for a right to visit his family in Canada, the State party in such a situation being bound by its obligations under article 17 of the Covenant not to interfere arbitrarily or unlawfully with the author's family.

B. Individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga (*dissenting*)

[Original: English]

For reasons more fully expressed in a separate opinion in Stewart v. Canada (No. 538/1993), we agree neither with the restrictive way in which the Committee has interpreted the expression "his own country" nor with the conclusions of the Committee set out in paragraph 11.3. In our view there are factors other than nationality which may establish close and enduring connections between a person and a country. The circumstances of the author suggest that he has such connections with Canada. We are therefore of the opinion that the author has a strong claim to the protection of article 12, paragraph 4, a claim which should be considered on its merits.

C. Individual opinion by Christine Chanet (*dissenting*)

[Original: French]

With regard to this case I stand by the comments which I made in the Stewart case (No. 538/1993).

In the present case, paragraph 11.3 of the Committee's views assimilates more clearly than in the aforesaid case the two distinct notions referred to in article 12, paragraph 4, of the Covenant, namely the notion of one's "own country" on the one hand and, on the other, that concerning the arbitrary nature of the decision to "deprive" (entry or re-entry).

The notion of "own country" does not fall within established legal categories such as nationality or temporary or permanent resident status; it is a term that refers not to the State but to a geographical place whose content and boundaries are less precise, and hence, in the absence of any reference to a specific legal concept, a case-by-case appreciation of the term is required. That appreciation has to be made by the State party to the Covenant, which can define what it means by "own country" in its internal legislation, subject to observance of the other provisions of the Covenant, which obviously excludes any "variable-geometry, discriminatory" definition. If the State were to engage in the latter exercise, it would create a situation of arbitrariness - arbitrariness in the definition of "own country".

However, such action is not to be confused with another, more limited situation of arbitrariness, as covered by the Covenant (article 12, para. 4), which in this instance concerns the actual decision to deport a person or to deny a person's right to enter his own country ("no one shall be arbitrarily deprived ..."). As worded, paragraph 11.3 of the Committee's views fails to make this distinction and intermingles, on the one hand, the criteria for determining whether a State is the "own country" of the author of the communication and, on the other, the entry and exit requirements for aliens. This amalgam leads to a simplification which reduces the text to the sole criterion of nationality, to that of its acquisition or withdrawal, and deportation measures (or entry rules) are never arbitrary when they comply with the conditions for acquisition or withdrawal of that nationality.

Rendering the application of article 12, paragraph 4, of the Covenant indissociable from nationality, or indeed naturalization, is in my view too easy a solution and is not in keeping with the actual letter of the text, which, had it been intended to be so restrictive, would have employed appropriate terms relating to nationality, a legal notion that is easier to define. The deliberate use of a vaguer and hence broader term indicates that the drafters of the Covenant did not wish to limit the scope of the text in the manner decided by the Committee.

L. Communication No. 560/1993; A v. Australia (Views adopted on 3 April 1997, fifty-ninth session)[*]

Submitted by:	A (name deleted) [represented by counsel]
Victim:	The author
State party:	Australia
Date of communication:	20 June 1993 (initial submission)
Date of decision on admissibility:	4 April 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1997,

Having concluded its consideration of Communication No. 560/1993 submitted to the Human Rights Committee on behalf of A under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[**]

1. The author of the communication is A, a Cambodian citizen who, at the time of submission of his communication on 20 June 1993, was detained at the Department of Immigration Port Hedland Detention Centre, Cooke Point, Western Australia. He was released from detention on 27 January 1994. He claims to be the victim of violations by Australia of article 9, paragraphs 1, 4 and 5, and article 14, paragraphs 1 and subparagraphs 3 (b), (c) and (d), juncto article 2, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel. The Optional Protocol entered into force for Australia on 25 December 1991.

Facts as submitted by the author

2.1 A, a Cambodian national born in 1934, arrived in Australia by boat, code-named "Pender Bay", together with 25 other Cambodian nationals, including his family, on 25 November 1989. Shortly after his arrival, he applied for refugee status under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol thereto. His application was formally rejected in December 1992.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Ms. Laure Moghaizel, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[**] An individual opinion (concurring) by Committee member Prafullachandra N. Bhagwati is appended to the present document.

2.2 Counsel provides a detailed chronology of the events in the case. The author's initial application for refugee status was filed on 9 December 1989, with the assistance of a Khmer interpreter and an immigration official. Legal assistance was not offered during the preparation of the application. On 13 December 1989, the author and other occupants of the boat were interviewed separately by the same immigration official. On 21 December 1989, the author and other Pender Bay occupants were flown to Villawood Detention Centre in Sydney. On 27 April 1990, the author was again interviewed by immigration officials regarding his application for refugee status. The application was rejected by the Federal Government's Determination of Refugee Status Committee on 19 June 1990; the decision was not communicated to the author. Counsel notes that, on that day, none of the Pender Bay detainees had yet seen a lawyer.

2.3 Following intercession by concerned parties, the Minister for Immigration allowed the New South Wales Legal Aid Commission to review the Pender Bay cases. Upon conclusion of its review, the Commission was authorized to provide further statements and material to the Immigration Department. Commission lawyers first visited the author at Villawood in September 1990. The Commission filed formal submissions on his behalf on 24 March and on 13 April 1991 but, because of new Determination of Refugee Status Committee regulations in force since December 1990, all applications had to be reassessed by Immigration Department desk officers. On 26 April 1991, the Commission was given two weeks to reply to the new assessments; replies were filed on 13 May 1991. On 15 May 1991, the Minister's delegate rejected the author's application.

2.4 On 20 May 1991, the author and other detainees were told that their cases had been rejected, that they had 28 days to appeal, and that they would be transferred to Darwin, several thousands of kilometres away in the Northern Territory. A copy of the rejection letter was given to them, but interpretation was not made available. At this moment, the detainees believed that they were being returned to Cambodia. During the transfer, no one was allowed to talk to the other detainees and permission to make telephone calls was refused. At no time was the New South Wales Legal Aid Commission informed of the removal of its clients from its jurisdiction.

2.5 The author was then transferred to Curragundi Camp, located 85 kilometres outside Darwin. The site has been described as "totally unacceptable" for a refugee detention centre by the Australian Human Rights and Equal Opportunity Commissioner as it is flood-prone during the wet season. More importantly, as a result of the move to the Northern Territory, contact between the author and the New South Wales Legal Aid Commission was cut off.

2.6 On 11 June 1991, the Northern Territory Legal Aid Commission filed an application with the Refugee Status Review Committee (which had replaced the Determination of Refugee Status Commission), requesting a review of the refusal to grant refugee status to the author and the other Pender Bay detainees. On 6 August 1991, the author was moved to Berrimah Camp, closer to Darwin, and from there, on 21 October 1991, to Port Hedland Detention Centre, approximately 2,000 kilometres away in Western Australia. As a result of the latter transfer, the author lost contact with his legal representatives in the Northern Territory Legal Aid Commission.

2.7 On 5 December 1991, the Refugee Status Review Committee rejected all of the Pender Bay applications for refugee status, including the author's. The detainees were not informed of the decisions until letters dated 22 January 1992 were transmitted to their former representatives on the Northern Territory Legal Aid Commission. On 29 January, the Commission addressed a letter to the Committee, requesting it to reconsider its decision and to allow reasonable time for the Pender Bay detainees to obtain legal representation to enable them to comment on the decision.

2.8 Early in 1992, the Federal Immigration Department contracted the Refugee Council of Australia to act as legal counsel for asylum-seekers held at Port Hedland. On 4 February 1992, Council lawyers started to interview inmates and, on 3 March 1992, the Council transmitted a response to the Refugee Status Review Committee's decision on the author's behalf to the Minister's delegate. On 6 April 1992, the author and several other Pender Bay detainees were informed that the Minister's delegate had refused their refugee status applications. Undertakings were immediately sought from the Immigration Department that none of the detainees would be deported until they had had the possibility of challenging the decision in the Federal Court of Australia; such undertakings were refused. However, later, on 6 April, the author obtained an injunction in the Federal Court, Darwin, which prevented the implementation of the decision. On 13 April 1992, the Minister for Immigration ordered the delegate's decision to be withdrawn, on account of an alleged error in the decision-making process. The effect of that decision was to remove the case from the jurisdiction of the Federal Court.

2.9 On 14 April 1992, Federal Court proceedings were abandoned and lawyers for the Immigration Department assured the court that a revised report on the situation in Cambodia would be made available to the Refugee Council of Australia by the Department of Foreign Affairs and Trade within two weeks. Meanwhile, the author had instructed his lawyer to continue with an application to the Federal Court, to seek release from detention; a hearing was scheduled for 7 May 1992 in the Federal Court at Melbourne.

2.10 On 5 May 1992, the Australian Parliament passed the Migration Amendment Act (1992), which amended the 1958 Migration Act by insertion of a new division 4B, which defined the author and others in situations similar to his as "designated persons". Section 54R stipulated: "a court is not to order the release from custody of a designated person". On 22 May 1992, the author instituted proceedings in the High Court of Australia, seeking a declaratory judgement that the relevant provisions of the Migration Amendment Act were invalid.

2.11 The revised report of the Department of Foreign Affairs and Trade, promised for the end of April 1992, was not finalized until 8 July 1992. On 27 July 1992, the Refugee Council of Australia forwarded a response to the update to the Immigration Department and, on 25 August 1992, the Refugee Status Review Committee once more recommended dismissal of the author's application for refugee status. On 5 December 1992, the Minister's delegate rejected the author's claim.

2.12 The author once more sought a review of the decision in the Federal Court of Australia, and since the Immigration Department refused to give assurances that the author would not be deported immediately to Cambodia, an injunction restraining the Department from removing the author was obtained in the Federal Court. In the meantime, by judgement of 8 December 1992, the High Court of Australia upheld the validity of major portions of the Migration Amendment Act, which meant that the author would remain in custody.

Complaint

3.1 Counsel argues that his client was detained "arbitrarily" within the meaning of article 9, paragraph 1. He refers to the Human Rights Committee's General Comment on article 9, which extends the scope of article 9 to cases of immigration control, and to the Views of the Committee on Communication No. 305/1988,[26] where arbitrariness was defined as not merely being against the law, but as including elements of "inappropriateness, injustice and lack of predictability". By reference to article 31 of the Convention Relating to the Status of Refugees and to Conclusion No. 44 (1986) of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on detention of refugee and asylum-seekers, it is argued that international treaty law and customary international law require that detention of asylum-seekers be avoided as a general rule. Where such detention may become necessary, it should be strictly limited (see Conclusion No. 44, subpara. (b)). Counsel provides a comparative analysis of immigration control and legislation in several European countries as well as Canada and the United States of America. He notes that, under Australian law, not all illegal entrants are subject to detention, nor all asylum-seekers. Those who arrive at Australian borders without a valid visa are referred to as "prohibited entrants" and may be detained under section 88 or 89 of the Migration Act 1958. Section 54B classifies individuals who are intercepted before or on arrival in Australia as "unprocessed persons". Such persons are deemed not to have entered Australia, and are taken to a "processing area".

3.2 The author and others arriving in Australia before 1992 were held by the Federal Government under section 88 as "unprocessed persons", until the entry into force of division 4B of the Migration Amendment Act. Counsel argues that, under these provisions, the State party has established a harsher regime for asylum-seekers who have arrived by boat, without documentation ("boat people") and who are designated under the provision. The practical effect of the amendment is said to be that persons designated under division 4B automatically remain in custody unless or until removed from Australia or granted an entry permit.

3.3 It is contended that the State party's policy of detaining boat people is inappropriate, unjustified and arbitrary, as its principal purpose is to deter other boat people from coming to Australia and to deter those already in the country from continuing with applications for refugee status. The application of the new legislation is said to amount to "human deterrence", based on the practice of rigidly detaining asylum-seekers under such conditions and for periods so prolonged that prospective asylum-seekers are deterred from even applying for refugee status and current asylum-seekers lose all hope and return home.

3.4 No valid grounds are said to exist for the detention of the author, as none of the legitimate grounds of detention referred to in Conclusion No. 44 (see para. 3.1 above) applies to his case. Furthermore, the length of detention - 1,299 days or three years and 204 days as at 20 June 1993 - is said to amount to a breach of article 9, paragraph 1.

3.5 Counsel further contends that article 9, paragraph 4, has been violated in the author's case. The effect of division 4B of the Migration Amendment Act is that once a person is qualified as a "designated person", there is no alternative to detention, and the detention may not be reviewed effectively by a court, as the courts have no discretion to order the person's release. This was conceded by the Minister for Immigration in a letter addressed to the Senate Standing Committee for the Scrutiny of Bills, which had expressed concern that the legislative amendment was to deny designated persons access to the courts and might raise problems in the light of Australia's obligations under the Covenant. The Australian Human Rights Commissioner, too, commented that the absence of court procedures to test either reasonableness or necessity of such detention was in breach of article 9, paragraph 4.

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[26] Van Alphen v. the Netherlands: Views adopted on 23 July 1990, para. 5.8.

3.6 It is further contended that persons such as the author have no effective access to legal advice, contrary to article 16 of the Convention Relating to the Status of Refugees. That individuals like the author are kept in prolonged custody is said to make access to lawyers all the more important. With respect to the author's case, counsel contends that the State party breached article 9, paragraph 4, and article 14 in the following situations:

(a) Preparation of application for refugee status;

(b) Access to lawyers during the administrative stage of the refugee process;

(c) Access to lawyers during the judicial review stage of the refugee process; in this context, it is noted that the frequent transfers of the author to detention facilities far away from major urban centres vastly compounded the difficulties in providing legal advice to him. Thus, Port Hedland, where A was held for over two years, is expensive to reach by air, and the nearest major town, Perth, is over 2,000 kilometres away. Because of the costs and logistical problems involved, it was difficult to find competent Refugee Council of Australia lawyers to take up the case.

3.7 Counsel contends that the serious delays on the part of the State party in determining the author's application for refugee status constitute a breach of article 14, subparagraph 3 (c), particularly given the fact that he remained in detention for much of the process.

3.8 It is contended that, as A was detained arbitrarily, he qualifies for compensation under article 9, paragraph 5, of the Covenant. Counsel submits that "compensation" in this provision must be understood to mean "just and adequate" compensation, but adds that the State party has removed any right to compensation for illegal detention by a legislative amendment to the Migration Act. He notes that as a result of the judgement of the High Court of Australia in A's case, further proceedings were filed in the High Court on behalf of the Pender Bay detainees - including the author - seeking damages for unlawful detention. On 24 December 1992, Parliament added Section 54RA(1)-(4) to division 4B of the Migration Act according to counsel in direct response to the High Court's findings in A's case and the imminence of the filing of possible claims for compensation for illegal detention. In paragraph 3, the new provision restricts compensation for unlawful detention to the symbolic sum of one dollar per day. It is submitted that the author is entitled to just and adequate compensation for: (a) pecuniary losses, namely, the loss of the boat in which he arrived in Australia; (b) non-pecuniary losses, including injury to liberty, reputation, and mental suffering; and (c) aggravated and exemplary damages based, in particular, on the length of the detention and its conditions. The symbolic sum the author might be entitled to under section 54RA(3) of division 4B would not meet the criteria for compensation under article 9, paragraph 5.

3.9 Finally, counsel argues that the automatic detention of boat people of primarily Asian origin, on the sole basis that they meet all the criteria of division 4B of the Migration Act 1958, constitutes discrimination on the basis of "other status" under article 2, paragraph 1, of the Covenant, "other status" being the status of boat people.

State party's admissibility observations and comments

4.1 In its submission under rule 91, the State party supplements the facts as presented by the author and provides a chronology of the litigation in which the author has been, and continues to be, involved. It notes that, after the final decision to reject the author's application for refugee status was taken in December 1992, the author continued to take legal proceedings challenging the validity of that decision. Detention after December 1992 is said to have been exclusively the result of legal challenges by the author. In this context, the State party recalls that, by a letter of 2 November 1993, the Minister for Immigration offered the author the opportunity, in the event of his voluntary return to Cambodia, of applying for (re-)entry to Australia after 12 months, on a permanent visa under the Special Assistance category. The State party further adds that the author's wife's application for refugee status has been approved and that, as a result, the author was released from custody on 21 January 1994 and will be allowed to remain in Australia.

4.2 The State party concedes the admissibility of the communication insofar as it alleges that the author's detention was "arbitrary" within the meaning of article 9, paragraph 1. It adds, however, that it strongly contests on the merits that the author's detention was "arbitrary", and that it contained elements of "inappropriateness, injustice and lack of predictability".

4.3 The State party challenges the admissibility of other elements of the complaint relating to article 9, paragraph 1. In this context, it notes that the communication is inadmissible ratione materiae, to the extent that it seeks to rely on customary international law or provisions of other international instruments such as the 1951 Convention Relating to the Status of Refugees. The State party argues that the Committee is competent only to determine whether there have been breaches of any of the rights set forth in the Covenant; it is not permissible to rely on customary international law or other international instruments as the basis of a claim.

4.4 Similarly, the State party claims that counsel's general claim that Australian policy of detaining boat people is contrary to article 9, paragraph 1, is inadmissible, as the Committee is not competent to review, in abstracto, particular government policies or to rely on the application of such policies to find breaches of the Covenant. Therefore, the communication is considered inadmissible to the extent that it invites the Committee to determine generally whether the policy of detaining boat people is contrary to article 9, paragraph 1.

4.5 The State party contests the admissibility of the allegation under article 9, paragraph 4, and argues that existing avenues for review of the lawfulness of detention under the Migration Act are compatible with article 9, paragraph 4. It notes that counsel does not allege that there is no right under Australian law to challenge the lawfulness of detention in court. Habeas corpus, for instance, a remedy available for this purpose, has never been invoked by the author. It is noted that the author did challenge the constitutional validity of division 4B of part 2 of the Migration Act in the Australian High Court, which upheld the relevant provision under which, from

6 May 1992, the author had been detained. In its judgment, the High Court confirmed that, if a person was unlawfully detained, he could request release by a court. Prior to his release, no proceedings to challenge the lawfulness of his detention were initiated by A, despite the possibility of such proceedings. Other detainees, however, successfully instituted proceedings which led to their release on the ground that they were held longer than allowed under division 4B of the Migration Act.[27] After this action, another 36 detainees were released from custody. The State party submits that, on the basis of the material submitted by counsel, there is "no basis whatsoever on which the Committee could find a breach of article 9, paragraph 4, on the ground that the author was unable to challenge the lawfulness of his detention". A violation has not been sufficiently substantiated, as required under rule 90 (b) of the rules of procedure. The State party adds that the allegations relating to article 9, paragraph 4, could be deemed an abuse of the right of submission and that, in any event, the author failed to exhaust domestic remedies in this respect, as he did not test the lawfulness of his detention.

4.6 To the extent that the communication seeks to establish a violation of article 9, paragraph 4, on the ground that the reasonableness or appropriateness of detention cannot be challenged in court, the State party considers that the absence of discretion for a court to order a person's release falls in no way within the scope of application of article 9, paragraph 4, which only concerns review of lawfulness of detention.

4.7 To the extent that the communication claims a breach of article 9, paragraph 4, because of absence of effective access to legal representation, the State party notes that this issue is not covered by the provision: access to legal representation cannot, in the State party's opinion, be read into the provision as in any way related to or a necessary right which flows from the guarantee that an individual is entitled to take proceedings before a court. It confirms that the author had access to legal advisers. Thus, the funding for legal assistance was provided through all the stages of the administrative procedure; subsequently, he had access to legal advice to pursue judicial remedies. For these reasons, the State party argues that there is insufficient substantiation of facts which might establish a violation of article 9, paragraph 4, by virtue of absence of access to legal advisers. To the extent that the claim concerning access to legal advisers seeks to rely on article 16 of the 1951 Convention Relating to the Status of Refugees, the State party refers to its arguments in paragraph 4.3 above.

4.8 The State party disputes that the circumstances of the author's detention give rise to any claim for compensation under article 9, paragraph 5, of the Covenant. It notes that the Government itself conceded in legal proceedings brought by the author and others that the applicants in this case had been detained without the statutory authority under which boat people had been held prior to the enactment of division 4B of part 2 of the Migration Act: this was merely the result of a bona fide but mistaken interpretation of the legislation under which the author had been held. On account of the inadvertent basis for the unlawful detention of individuals in the author's situation, the Australian Parliament enacted special compensation legislation. The State party considers this legislation compatible with article 9, paragraph 5.

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[27] Tang Jia Xin v. Minister for Immigration and Ethnic Affairs No. 1 (1993), 116 ALR 329; Tang Jia Xin v. Minister for Immigration and Ethnic Affairs No. 2 (1993), 116 ALR 349.

4.9 The State party points out that a number of boat people have instituted proceedings challenging the constitutional validity of the relevant legislation. As the author is associated with those proceedings, he cannot be deemed to have exhausted domestic remedies in respect of his claim under article 9, paragraph 5.

4.10 The State party refutes the author's claim that article 14 applies to immigration detention and considers the communication inadmissible to the extent that it relies on article 14. It recalls that article 14 only applies to criminal charges; detention for immigration purposes is not detention under criminal law, but administrative detention, to which article 14, paragraph 3, is clearly inapplicable. This part of the communication is therefore considered inadmissible ratione materiae.

4.11 Finally, the State party rejects the author's allegation of discrimination based on articles 9 and 14 juncto article 2, paragraph 1, on the ground that there is no evidence to sustain a claim of discrimination on the ground of race. It further submits that the quality of "boat person" cannot be approximated to "other status" within the meaning of article 2. Accordingly, this aspect of the case is deemed inadmissible ratione materiae, as incompatible with the provisions of the Covenant.

4.12 In relation to the allegation of discrimination on the basis of race, the State party affirms that there is no substance to this claim, as the law governing detention of illegal boat arrivals applies to individuals of all nationalities, regardless of their ethnic origin or race. The State party proceeds to an analysis of the meaning of the term "other status" in articles 2 and 26 of the Covenant and, by reference to the Committee's jurisprudence on this issue, recalls that the Committee itself has held that there must be limits to the term "other status". In order to be subsumed under this term, the State party argues, a communication must point to some status based on the personal characteristics of the individual concerned. Under Australian law, the only basis may be seen to be the fact of illegal arrival of a person by boat: "Given that a State is entitled under international law to determine whom it admits to its territory, it cannot amount to a breach of articles 9 and 14 in conjunction of article 2, paragraph 1, for a State to provide for illegal arrivals to be treated in a certain manner based on their method of arrival". For the State party, there is no basis in the Committee's jurisprudence relating to discrimination under article 26 under which "boat person" could be regarded as "other status" within the meaning of article 2.

5.1 In his comments, counsel takes issue with some of the State party's arguments. He disputes that the three-year period necessary for the final decision of the author's application for refugee status was largely attributable to delays in making submissions and applications by lawyers, with a view to challenging the decision-making process. In this context, he notes that of the 849 days which the administrative process lasted, the author's application was with the Australian authorities for 571 days - two thirds of the time. He further recalls that during this period the author was moved four times and had to rely on three unrelated groups of legal representatives, all of whom were funded with limited public resources and needed time to acquaint themselves with the file.

5.2 Counsel concedes that the author was given a domestic Protection (Temporary) Entry Permit on 21 January 1994 and released from custody after his wife was granted refugee status because of her Vietnamese ethnic origin. It is submitted that the author could not have brought his detention to an end by leaving Australia voluntarily and returning to Cambodia, first because he genuinely feared persecution if he returned to Cambodia and, secondly, because it would have been unreasonable to expect him to return to Cambodia without his wife.

5.3 The author's lawyer reaffirms that his reliance on article 31 of the 1951 Convention Relating to the Status of Refugees or other instruments to support his allegation of a breach of article 9, paragraph 1, is simply for the purpose of interpreting and elaborating on the State party's obligations under the Covenant. He contends that other international instruments may be relevant in the interpretation of the Covenant, and in this context draws the Committee's attention to a statement made by the Attorney-General's Department before the Joint Committee on Migration, in which it was conceded that treaty bodies such as the Human Rights Committee may rely on other international instruments for the purpose of interpreting the scope of the treaty of which they monitor the implementation.

5.4 Counsel reiterates that he does not challenge the State party's policy vis-à-vis boat people in abstracto, but submits that the purpose of Australian policy, namely, deterrence, is relevant inasmuch as it provides a test against which "arbitrariness" within the meaning of article 9, paragraph 1, can be measured: "It is not possible to determine whether detention of a person is appropriate, just or predictable without considering what was in fact the purpose of the detention". The purpose of detention in the author's case was enunciated in the Minister for Immigration's introduction to the Migration Legislation Amendment Bill 1992; this legislation, it is submitted, was passed in direct response to an application by the author and other Cambodian nationals for release by the Federal Court, which was due to hear the case two days later.

5.5 Concerning the claim under article 9, paragraph 4, counsel submits that, where discretion under division 4B of the Migration Act 1958 to release a designated person does not exist, the option to take proceedings for release in court is meaningless.

5.6 Counsel concedes that, after the decision of the High Court in December 1992, no further challenge was indeed made to the lawfulness of the author's detention. This was because A clearly came within the scope of division 4B and not within the scope of the 273-day provisions in section 54Q, so that any further challenge to his continued detention would have been futile. It is submitted that the author is not required to pursue futile remedies to establish a breach of article 9, paragraph 4, or to establish that domestic remedies have been exhausted under article 5, subparagraph 2 (b), of the Optional Protocol.

5.7 Counsel insists that an entitlement to take proceedings before a court under article 9, paragraph 4, necessarily requires that an individual have access to legal advice. Wherever a person is under detention, access to the courts can generally only be achieved through assistance of counsel. In this context, counsel disputes that his client had adequate access to legal advice: no legal representation was afforded to him from 30 November 1989 to 13 September 1990, when the New South Wales Legal Aid Commission began to represent him. It is submitted that the author, who was unaware of his right to legal assistance and who spoke no English, should have been advised of his right to legal advice and that there was a positive duty upon the State party to inquire of the author whether he sought legal advice. This positive duty is said to be consistent with principle 17(1) of the Body of Principles for the

Protection of All Persons under Any Form of Detention or Imprisonment and rule 35(1) of the Standard Minimum Rules for the Treatment of Prisoners.

5.8 Author's counsel adds that on two occasions his client was forcibly removed from a State jurisdiction and therefore from access to his lawyers. On neither occasion was adequate notice of his removal given to his lawyers. It is submitted that these events constitute a denial of the author's access to his legal advisers.

5.9 Concerning the State party's observations on the claim under article 9, paragraph 5, counsel observes that the author is not a party to proceedings currently under way which challenge the validity of the legislation restricting damages for unlawful detention to one dollar per day. Rather, the author is plaintiff in a separate action which has not proceeded beyond initial procedural stages and will not be heard for at least a year. Counsel contends that his client is not required to complete these proceedings in order to comply with the requirements of article 5, subparagraph 2 (b), of the Optional Protocol. In this context, he notes that, in June 1994, the Australian Parliament introduced new legislation to amend retrospectively the Migration Act 1958, thereby foreclosing any rights which the plaintiffs in the case of Chu Kheng Lim (concerning unlawful detention of boat people) may have to damages for unlawful detention. On 21 September 1994, the Government introduced Migration Legislation Amendment Act (No. 3) 1994 ("Amendment No. 3"), which intended to repeal the original "dollar a day" legislation. As a direct result of this legislation, the High Court proceedings in the case of Ly Sok Pheng v. Minister for Immigration, Local Government and Ethnic Affairs were adjourned from October 1994 until at least April 1995. If Amendment No. 3 is enacted into law, which remains the intention of the Federal Government, any action introduced by the author seeking damages for unlawful detention would be made meaningless.

5.10 Counsel disputes the State party's argument that article 14, paragraph 3, is not applicable to individuals in administrative detention and refers in this context to rule 94 of the Standard Minimum Rules for the Treatment of Prisoners, which equates the rights of persons detained for criminal offences with those of "civil prisoners".

5.11 Finally, counsel reaffirms that "boat people" constitute a cohesive group which may be subsumed under the term "other status" within the meaning of article 2, paragraph 1, of the Covenant: "all share the common characteristic of having arrived in Australia within a set time period, not having presented a visa, and having been given a designation by the Department of Immigration". Those matching this definition must be detained. To counsel, it is "this immutable characteristic which determines that this group will be treated differently to other asylum seekers in Australia".

Committee's decision on admissibility

6.1 During its fifty-third session, the Committee considered the admissibility of the communication. It noted that several of the events complained of by the author had occurred prior to the entry into force of the Optional Protocol for Australia; however, as the State party had not wished to contest the admissibility of the communication on this ground and, as the author had remained in custody after the entry into force of the Optional Protocol for Australia, the Committee was satisfied that the complaint was admissible *ratione temporis*. It further acknowledged that the State party had conceded the admissibility of the author's claim under article 9, paragraph 1.

6.2 The Committee noted the author's claim there was no way to obtain an effective review of the lawfulness of his detention, contrary to article 9, paragraph 4, and the State party's challenge of the author's argument. The Committee considered that the question of whether article 9, paragraph 4, had been violated in the author's case and whether this provision encompasses a right of access to legal advice was a question to be examined on the merits.

6.3 The Committee specifically distinguished this finding from its earlier decision in the case of V. M. R. B. v. Canada[28] since, in the present case, the author's entitlement to refugee status remained to be determined at the time of submission of the communication, whereas in the former case an exclusion order was already in force.

6.4 On the claim under article 9, paragraph 5, the Committee noted that proceedings challenging the constitutional validity of section 54RA of the Migration Act were under way. The author had argued that it would be too onerous to challenge the constitutionality of this provision and that it would be meaningless to pursue this remedy, owing to long delays in court and because of the Government's intention to repeal said remedy. The Committee noted that mere doubts about the effectiveness of local remedies or the prospect of financial costs involved did not absolve an author from pursuing such remedies. As to counsel's reference to draft legislation which would eliminate the remedy sought, the Committee noted that this had not yet been enacted into law, and that counsel therefore relied on hypothetical developments in Australia's legislature. This part of the communication was accordingly deemed inadmissible under article 5, subparagraph 2 (b), of the Optional Protocol.

6.5 As to the claim under article 14, the Committee recalled the State party's claim that detention of boat people qualified as "administrative detention" which cannot be subsumed under article 14, paragraph 1, let alone paragraph 3. The Committee observed that the author's detention, as a matter of Australian law, neither related to criminal charges against him nor to the determination of his rights and obligations in a suit at law. It considered, however, that the issue of whether the proceedings relating to the determination of the author's status under the Migration Amendment Act nevertheless fell within the scope of article 14, paragraph 1, was a question to be considered on the merits.

6.6 Finally, with respect to the claim under article 2, paragraph 1, juncto articles 9 and 14, the Committee observed that it had not been substantiated, for purposes of admissibility, that A was discriminated against on account of his race and/or ethnic origin. It was further clear that domestic remedies in this respect had not been exhausted, as the matter of alleged race- or ethnic origin-based discrimination had never been raised before the courts. In the circumstances, the Committee held this claim to be inadmissible under article 5, subparagraph 2 (b), of the Optional Protocol.

6.7 On 4 April 1995, therefore, the Committee declared the communication admissible insofar as it appeared to raise issues under article 9, paragraphs 1 and 4, and article 14, paragraph 1.

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[28] Communication No. 236/1987 (V. M. R. B. v. Canada), inadmissibility decision of 18 July 1988, para. 6.3.

State party's observations on the merits submission and counsel's comments thereon

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated May 1996, the State party supplements the facts of the case and addresses the claims under article 9, paragraphs 1 and 4, and article 14, paragraph 1. It recalls that Australia's policy of detention of unauthorized arrivals is part of its immigration policy. Its rationale is to ensure that unauthorized entrants do not enter the Australian community until their alleged entitlement to do so has been properly assessed and found to justify entry. Detention seeks to ensure that whoever enters Australian territory without authorization can have any claim to remain in the country examined and, if the claim is rejected, will be available for removal. The State party notes that from late 1989, there was a sudden and unprecedented increase of applications for refugee status from individuals who had landed on the country's shores. This led to severe delays in the length of detention of applicants, as well as to reforms in the law and procedures for determination of on-shore applications for protection visas.

7.2 As to the necessity of detention, the State party recalls that unauthorized arrivals who landed on Australian shores in 1990 and early 1991 were held in unfenced migrant accommodation hostels with a reporting requirement. However, security arrangements had to be upgraded as a result of the number of detainees who absconded and the difficulty in obtaining cooperation from local ethnic communities to recover individuals who had not met their reporting obligations; 59 persons who had arrived by boat escaped from detention between 1991 and October 1993. Of the individuals who were allowed to reside in the community while their refugee status applications were being determined, it is noted that out of a group of 8,000 individuals who had been refused refugee status, some 27 per cent remained unlawfully on Australian territory, without any authority to remain.

7.3 The State party points out that its policy of mandatory detention for certain border claimants should be considered in the light of its full and detailed consideration of refugee claims and its extensive opportunities to challenge adverse decisions on claims to refugee status. Given the complexity of the case, the time it took to collect information on the continuously changing situation in Cambodia and for A's legal advisers to make submissions, the duration of the author's detention was not abusively long. Furthermore, the conditions of detention of A were not harsh, prison-like or otherwise unduly restrictive.

7.4 The State party reiterates that the author was informed, during his first interview after landing in Australia, that he was entitled to seek legal advice and legal aid. He had continued contact with community support groups which could have informed him of his entitlement. According to the State party, legal expertise is unnecessary to make an application for refugee status, as entitlement is primarily a matter of fact. The State party underlines that throughout his detention, reasonable facilities for obtaining legal advice or initiating proceedings would have been available to the author, had he sought them. After 13 September 1990, the author was a party to several court actions; according to the State party, there is no evidence that at any time A failed to obtain legal advice or representation when he sought it. On balance, the conditions under which the author was detained did not obstruct his access to legal advice (see paras. 7.8 to 7.11 below). The State party maintains that contrary to counsel's assertion, long delays did not result from any change in legal advisers after A's consecutive moves between detention centres.

7.5 As to the claim under article 9, paragraph 1, the State party argues that the author's detention was lawful and not arbitrary on any ground. A entered Australia without authorization and subsequently applied for the right to remain on refugee status basis. Initially, he was held pending examination of his application. His subsequent detention was related to his appeals against the decisions refusing his application, which made him liable to deportation. Detention was considered necessary primarily to prevent him from absconding into the Australian community.

7.6 The State party notes that the travaux préparatoires to article 9, paragraph 1, show that the drafters of the Covenant considered that the notion of "arbitrariness" included "incompatibility with the principles of justice or with the dignity of the human person". Furthermore, it refers to the Committee's jurisprudence according to which the notion of arbitrariness must not be equated with "against the law", but must be interpreted more broadly as encompassing elements of inappropriateness, injustice and lack of predictability.[29] Against this background, the State party contends, detention in a case such as the author's was not disproportionate nor unjust; it was also predictable, in that the applicable Australian law had been widely publicized. To the State party, counsel's argument that it is inappropriate per se to detain individuals entering Australia in an unauthorized manner is not borne out by any of the provisions of the Covenant.

7.7 The State party asserts that the argument that there is a rule of public international law, be it derived from custom or conventional law, against the detention of asylum seekers, is not only erroneous and unsupported by prevailing State practice, but also irrelevant to the considerations of the Human Rights Committee. The instruments and practice invoked by counsel, inter alia, the 1951 Convention Relating to the Status of Refugees, Conclusion 44 of the Executive Committee of the Office of the United Nations High Commissioner for Refugees, the Convention on the Rights of the Child, the practice of 12 Western States - are said to fall far short from proving the existence of a rule of customary international law. In particular, the State party disagrees with the suggestion that rules or standards which are said to exist under customary international law or under other international agreements may be imported into the Covenant. The State party concludes that detention for purposes of exclusion from the country, for the investigation of protection claims and for handling refugee or entry permit applications and protecting public security is entirely compatible with article 9, paragraph 1.

7.8 As to the claim under article 9, paragraph 4, the State party reaffirms that it was always open to the author to file an action challenging the lawfulness of his detention, for example, by seeking a ruling from the courts as to whether his detention was compatible with Australian law. The courts had the power to release A if they determined that he was being unlawfully detained. In that respect, the State party takes issue with the Committee's admissibility considerations relating to article 9, paragraph 4. For the State party, this provision does not require that State party courts must always be free to substitute their discretion for the discretion of Parliament, inasmuch as detention is concerned: "[T]he Covenant does not require that a court must be able to order the release of a detainee, even if the detention was according to law".

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[29] See Views on Communication No. 305/1988 (Hugo van Alphen v. The Netherlands), adopted on 23 July 1990, para. 5.8.

7.9 Furthermore, the State party specifically rejects the notion that article 9, paragraph 4, implicitly includes the same (procedural) guarantees for provision of legal assistance as are set out in article 14, paragraph 3: in its opinion, a distinction must be drawn between the provision of free legal assistance in terms of article 14, paragraph 3, and allowing access to legal assistance. In any event, it continues, there is no substance to the author's allegation that his rights under article 9, paragraph 4, were impeded by an alleged absence of effective access to legal advice. The author "had ample access to legal advice and representation for the purpose of challenging the lawfulness of his detention" and was legally represented when he brought such a challenge.

7.10 In support of its argument, the State party provides a detailed chronology of attempts to inform A of his right to legal advice:

(a) The form used for applications for refugee status advises applicants of their right to have a legal adviser present during interview and to ask for legal aid assistance. The application form was read to the author on 9 December 1989 at Willie's Creek in the Kampuchean language by an interpreter, completed and signed by the author. The author did not request legal advice or access to a lawyer at this time;

(b) During his first six months of detention, the author had contact with members of the Australian community, as well as with the Cambodian, Khmer and Indo-Chinese communities in Sydney, which provided some support to the Pender Bay detainees. These groups would have been able to provide access to legal advisers;

(c) In June/July 1990, the Jesuit Refugee Service approached the Legal Aid Commission of New South Wales to represent the Pender Bay detainees. On 11 September 1990, A authorized the Legal Aid Commission to represent him. Prior to the Commission's involvement, the Department of Immigration and Ethnic Affairs had planned to move the Pender Bay detainees from Sydney in early October 1990. To ensure continued access to their legal representatives, the group was not moved to Darwin until 20 May 1991;

(d) At the time of the move to Darwin, the Legal Aid Commission advised the Northern Territory Legal Aid Commission that the group was being relocated. The Northern Territory Legal Aid Commission lawyers were at the Curragundi camp (near Darwin) approximately one week after the Pender Bay group's arrival. When A was moved to Port Hedland on 21 October 1991, the Northern Territory Commission continued to act on his behalf until 29 January 1992, when it advised the Department of Immigration and Ethnic Affairs that it could no longer represent the Pender Bay detainees. On 3 February 1992, the Refugee Council of Australia took over the function of representatives of all Pender Bay detainees;

(e) The Northern Territory Legal Aid Commission was retained by members of the Pender Bay group for Federal Court proceedings in April 1992. The Refugee Council of Australia continued to provide advice in relation to the refugee status applications.

7.11 The State party points out that prior to 1991/1992, funds for legal assistance were not specifically earmarked for asylum seekers in detention, but individual applicants had access to legal aid through the normal channels, with non-governmental organizations also providing support. Since 1992, legal assistance is provided to applicants through contractual agreements between the Department of Immigration and Ethnic Affairs and the Refugee Council of

Australia and Australian Lawyers for Refugees. The State party notes that in the proceedings seeking to overturn the decision which refused him refugee status, A was legally represented. His advisers included not only the Legal Aid Commission of New South Wales and the Northern Territory Legal Aid Commission, but also Refugee Advice Casework and two large law firms.

7.12 The State party contests that delays in the hearing of A's case were attributable to his losing contact with legal advisers after each move between detention centres. When the author was removed from Sydney to Curragundi on 21 May 1991, the Legal Aid Commission of New South Wales immediately advised the Northern Territory Legal Aid Commission, and on 11 June, the Northern Territory Commission forwarded to the Refugee Status Review Committee an application for review of refusal to grant refugee status to members of the group. When the author was removed to Port Hedland on 21 October 1991, the application for review was under consideration by the Refugee Status Review Committee, and there was no need for immediate action by the author's legal advisers. When the Committee's recommendation to refuse the application was made known to the Northern Territory Legal Aid Commission on 22 January 1992, the Commission requested a reasonable time for the author to get legal assistance. The Refugee Council of Australia arrived in Port Hedland on 3 February 1992 to represent the author, and lodged a response to the Refugee Status Review Committee's recommendation on 3 March 1992. The State party contends that nothing suggests that requests for review in these two cases would have been lodged much earlier had there been no change in legal representation.

7.13 Finally, the State party denies that there is any evidence that the remote location of the Port Hedland Detention Centre was such as to obstruct access to legal assistance. There are forty-two flights to and from Perth each week, with a flight time of 130 to 140 minutes; early morning flights would enable lawyers to be in Port Hedland before 9 a.m. The State party notes that a team of six lawyers and six interpreters, contracted by the Refugee Council of Australia, with funding from the Department of Immigration and Ethnic Affairs, lived in Port Hedland for most of 1992 to provide legal advice to the detainees.

7.14 As to article 14, paragraph 1, the State party contends that no argument can be made that there was a breach of the author's right to equality before the courts: in particular, he was not subject to any form of discrimination on the grounds that he was an alien. It notes that if the Committee were to consider that equality before the courts encompasses a right to (obligatory) legal advice and representation, it must be recalled that the author's access to such advice was never, at any stage during his detention, impeded (see paras. 7.9 and 7.10 above).

7.15 The State party affirms that the second and third sentences of article 14, paragraph 1, do not apply to refugee status determination proceedings. Such proceedings cannot be described as a "determination ... of his rights and obligations in a suit at law". Reference is made in this context to decisions of the European Commission of Human Rights, which are said to support this conclusion.[30] The State party fully accepts that aliens subject to its jurisdiction may enjoy the protection of Covenant rights: "However, in determining which provisions of the Covenant apply in such circumstances, it is necessary to examine their terms. This interpretation is supported by the terms of the second and third sentences of article 14, paragraph 1, which are limited to certain types of proceedings determining certain types of rights, which are not those involved in [the] case". If the Covenant lays down procedural guarantees for the determination of entitlement to refugee status, those in article 13 appear more appropriate to the State party than those in article 14, paragraph 1.

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[30] See X, Y, Z and W v. United Kingdom (Communication No. 3325/67); and Agee v. United Kingdom (Communication No. 7729/76).

7.16 If the Committee were to consider that the second and third sentences of article 14, paragraph 1, are applicable to the author's case, then the State party notes that:

(a) Hearings in all cases to which A was a party were conducted by competent, independent and impartial tribunals;

(b) Judicial hearings on review were conducted in public, and such decisions as were rendered were made public;

(c) Administrative proceedings to determine whether the Minister for Immigration, Local Government and Ethnic Affairs should grant refugee status were held in camera, but the State party argues that privacy of these administrative proceedings was justified by considerations of ordre public, because it would be harmful to refugee status applicants for their cases to be made public;

(d) Such decision of administrative tribunals as were handed down in the author's case were not made public. To the Australian Government, the limited exceptions to the rule of publicity of judgements enunciated in article 14, paragraph 1, indicate that the notion of "suit at law" was not intended to apply to the administrative determination of applications for refugee status;

(e) A had at all times access to legal representation and advice;

(f) Finally, given the complexity of the case and of the legal proceedings involving the author, the State party reiterates that the delays encountered in the case were not such as to amount to a breach of the right to a fair hearing.

8.1 In his comments, dated 22 August 1996, counsel takes issue with the State party's explanation of the rationale for immigration detention. At the time of the author's detention, the only category of unauthorized border arrivals in Australia who were mandatorily detained were so-called "boat people". He submits that the Australian authorities had an unjustified fear of a flood of unauthorized boat arrivals, and that the policy of mandatory detention was used as a form of deterrence. As to the argument that there was an "unprecedented influx" of boat people into Australia from the end of 1989, counsel notes that the 33,414 refugee applications from 1989 to 1993 must be put into perspective - the figure pales in comparison to the number of refugee applications filed in many Western European countries over the same period. Australia remains the only Western asylum country with a policy of mandatory, non-reviewable detention.

8.2 In any case, counsel adds, lack of preparedness and adequate resources cannot justify a continued breach of the right to be free from arbitrary detention; he refers to the Committee's jurisprudence that lack of budgetary appropriations for the administration of criminal justice does not justify a four-year period of pre-trial detention. It is submitted that the 77-week period it took for the primary processing of the author's asylum application, while he was detained, was due to inadequate resources.

8.3 Counsel rejects the State party's attempts to attribute some of the delays in the handling of the case to the author and his advisers. He reiterates that Australia mishandled A's application and maintains that there was no excuse for the authorities to take seven months for a primary decision on his application, which was not even notified to him, another eight months for a new primary decision, six months for a review decision and approximately five months for a final rejection, which could not be defended in court. Counsel suggests that it is less important to determine why delays occurred, but to ask why the author was detained throughout the period when his application was being considered: when the original decision was referred back to immigration authorities after Australia could not defend it in court, the State party took the unprecedented step of passing special legislation (Migration Amendment Act 1992), with the sole purpose of keeping the author and other asylum seekers in detention.

8.4 As to the question of the author's access to legal advice, counsel affirms that contrary to the State party's assertion, legal expertise is necessary when applying for refugee status, as well as for any appeal processes - had the author had no access to lawyers, he would have been deported from Australia in early 1992. Counsel considers it relevant that the current practice is for Australian authorities to assign legal assistance to asylum seekers immediately when they indicate that they wish to seek asylum. It is submitted that A should have been provided with a lawyer when he requested asylum in December 1989.

8.5 Counsel reiterates that the author had no contact with a representative for nearly 10 months after his arrival, i.e. until September 1990, although a final decision had been made on his claim in June 1990. When, in 1992, he did seek legal aid to obtain judicial review of the decision rejecting his application for refugee status, his request was refused. Resort to pro bono representation was only obtained when legal assistance was refused and, in counsel's opinion, it is erroneous to argue that State-sponsored legal assistance was unnecessary because pro bono assistance was available; in fact, pro bono assistance had to be found because legal aid had already been refused.

8.6 Counsel acknowledges that many flights are indeed available to and from Port Hedland, but points out that these connections are expensive. He maintains that the isolation of Port Hedland did in fact restrict access to legal advice; this factor was raised repeatedly before the Joint Standing Committee on Migration which, while conceding that there were some difficulties, rejected any recommendation that the detention facility be moved.

8.7 On the issue of the "arbitrariness" of the author's detention, counsel notes that the State party incorrectly seeks to blame the author for the prolongation of his detention. In this context, he argues that A should not have been penalized by prolonged detention for the exercise of his legal rights. He further denies that the detention was justified because of a perceived likelihood that the author might abscond from the detention centre; he points out that the State party has been unable to make more than generalized assertions on this issue. Indeed, he submits, the consequences of long-term custody are so severe that the burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalized claims that the individual may abscond if released.

8.8 Counsel reaffirms that there is a rule of customary international law to the effect that asylum seekers should not be detained for prolonged periods, and that the pronouncements of authoritative international bodies, such as the Office of the United Nations High Commissioner for Refugees, and the practice of other States, all point to the existence of such a rule.

8.9 Concerning the State party's claim that the author always had the opportunity to challenge the lawfulness of his detention, and that such a challenge was not necessarily bound to fail, counsel observes the following:

(a) While the High Court held section 54R to exceed the State party's legislative power and therefore unconstitutional, the unenforceability of the provision does not mean that, once a person is a "designated person" within the meaning of the Migration Act, he can realistically challenge the detention. It simply means that Parliament does not have the power, by virtue of section 54R, to direct the Judiciary not to release a designated person. In practice, however, if someone fits the definition of a "designated person", there still is no possibility of obtaining release by the courts.

(b) By reference to section 54Q of the Act (now section 182), under which detention provisions cease to apply to a designated person who has been in immigration detention for more than 273 days, it is submitted that a period of 273 days during which there is no possibility of release by the courts is per se arbitrary within the meaning of article 9, paragraph 1. According to counsel, it is virtually impossible for a designated person to be released even after the 273 calendar days since, under section 54Q, the countdown towards the 273 day cut-off date ceases where the Department of Immigration and Ethnic Affairs is awaiting information from individuals outside its control.

8.10 Counsel rejects the argument that since the guarantees of article 14, subparagraph 3 (d), are not spelled out in article 9, paragraph 4, A had no right to access to state-funded legal aid. He argues that immigration detention is a quasi-criminal form of detention, which, in his opinion, requires the procedural protection spelled out in article 14, paragraph 3. In this context, he notes that other international instruments, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 17) recognize that all persons subjected to any form of detention are entitled to have access to legal advice and be assigned legal advisers without payment where the interests of justice so require.

8.11 Finally, counsel reaffirms that the proceedings concerning A's status under the Migration Amendment Act can be subsumed under article 14, paragraph 1: (even) during its administrative stage, the author's application for refugee status came within the scope of article 14. The exercise of his rights to judicial review in relation to his application for refugee status, as well as his challenge to detention in the local courts gave rise to a "suit at law". In this connection, counsel contends that by initiating proceedings against the Department of Immigration and Ethnic Affairs, with a view to reviewing the decisions to refuse his application for refugee status, the proceedings went beyond any review on the merits of his application and became a civil dispute about the Department's failure to guarantee him procedural fairness. And by filing proceedings seeking his release, the author disputed the constitutionality of the Migration Act's new provisions under which he was held - again, this is said to have been a civil dispute.

Examination of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information placed before it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol to the Covenant. Three questions are to be determined on their merits:

(a) Whether the prolonged detention of the author, pending determination of his entitlement to refugee status, was "arbitrary" within the meaning of article 9, paragraph 1;

(b) Whether the alleged impossibility to challenge the lawfulness of the author's detention and his alleged lack of access to legal advice was in violation of article 9, paragraph 4;

(c) Whether the proceedings concerning his application for refugee status fall within the scope of application of article 14, paragraph 1 and whether, in the affirmative, there has been a violation of article 14, paragraph 1.

9.2 On the first question, the Committee recalls that the notion of "arbitrariness" must not be equated with "against the law", but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4 The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case that would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.

9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant. As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

9.6 As regards the author's claim that article 9, paragraph 4, encompasses a right to legal assistance in order to have access to the courts, the Committee notes from the material before it that the author was entitled to legal assistance from the day he requested asylum and would have had access to it, had he requested it. Indeed, the author was informed on 9 December 1989, in the attachment to the form he signed on that day, of his right to legal assistance. This form was read in its entirety to him in Kampuchean, his own language, by a certified interpreter. That the author did not avail himself of this possibility at that point in time cannot be held against the State party. Subsequently (as of 13 September 1990), the author sought legal advice and received legal assistance whenever requesting it. That A was moved repeatedly between detention centres and was obliged to change his legal representatives cannot detract from the fact that he retained access to legal advisers; that this access was inconvenient, notably because of the remote location of Port Hedland, does not, in the Committee's opinion, raise an issue under article 9, paragraph 4.

9.7 In the circumstances of the case and given the above findings, the Committee need not consider whether an issue under article 14, paragraph 1, of the Covenant arises.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, concludes that the facts as found by the Committee reveal a breach by Australia of article 9, paragraphs 1 and 4, and article 2, paragraph 3, of the Covenant.

11. Under article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy. In the Committee's opinion, this should include adequate compensation for the length of the detention to which A was subjected.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

APPENDIX

Individual opinion by Prafullachandra N. Bhagwati (*concurring*)

[Original: English]

I am in agreement with the opinion rendered by the Committee save and except that in regard to paragraph 9.5, I would prefer the following formulation:

> "9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act on 5 May 1992; after that date, the domestic courts retained the power of judicial review of detention with a view to ordering the release of a person if they found the detention to be unlawful. But with regard to a particular category of persons falling within the meaning of the expression 'designated person' in the Migration Amendment Act, the power of the courts to review the lawfulness of detention and order release of the detention was found unlawful, was taken away by section 54R of the Migration Amendment Act. If the detained person was a 'designated person' the courts had no power to review the continued detention of such person and order his/her release. The only judicial review available in such a case was limited to a determination of the fact whether the detained person was a 'designated person' and if he was, the court could not proceed further to review the lawfulness of his detention and order his/her release. The author in the present case, being admittedly a 'designated person' was barred by section 54R of the Migration Amendment Act from challenging the lawfulness of his continued detention and seeking his release by the courts."

But it was argued on behalf of the State that all that article 9, paragraph 4, of the Covenant requires is that the person detained must have the right and opportunity to take proceedings before a court for review of lawfulness of his/her detention and lawfulness must be limited merely to compliance of the detention with domestic law. The only inquiry which the detained person should be entitled to ask the court to make under article 9, paragraph 4, is whether the detention is in accordance with domestic law, whatever the domestic law may be. But this would be placing too narrow an interpretation on the language of article 9, paragraph 4, which embodies a human right. It would not be right to adopt an interpretation which will attenuate a human right. It must be interpreted broadly and expansively. The interpretation contended for by the State will make it possible for the State to pass a domestic law virtually negating the right under article 9, paragraph 4, and making nonsense of it. The State could, in that event, pass a domestic law validating a particular category of detentions and a detained person falling within that category would be effectively deprived of his/her right under article 9, paragraph 4. I would therefore place a broad interpretation on the word "lawful", which would carry out the object and purpose of the Covenant, and, in my view, article 9, paragraph 4, requires that the court be empowered to order release "if the detention is not lawful", that is, the detention is arbitrary or incompatible with the requirement of article 9, paragraph 1, or with other provisions of the Covenant. It is no doubt true that the drafters of the Covenant have used the word "arbitrary" along with "unlawful" in article 17 while the word "arbitrary" is absent in article 9, paragraph 4. But it is elementary that detention which is arbitrary is unlawful or in other words, unjustified by law. Moreover the word "lawfulness" which calls for interpretation in article 9, paragraph 4, occurs in the Covenant and must therefore be interpreted in the context of the provisions of the Covenant and having regard to the object and purpose of the Covenant. This conclusion is furthermore supported by article 9, paragraph 5, which governs the granting of compensation for detention "unlawful" either under the terms of the domestic law or within the meaning of the Covenant or as being arbitrary. Since the author in the present case was totally barred by section 54R of the Migration Amendment Act from challenging the "lawfulness" of his detention and seeking his release, his right under article 9, paragraph 4, was violated.

M. Communication No. 561/1993; Desmond Williams v. Jamaica (Views adopted on 8 April 1997, fifty-ninth session)*

Submitted by:	Desmond Williams [represented by Ms. K. Aston]
Victim:	The author
State party:	Jamaica
Date of communication:	30 June 1993 (initial submission)
Date of decision on admissibility:	6 July 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1997,

Having concluded its consideration of Communication No. 561/1993 submitted to the Human Rights Committee on behalf of Mr. Desmond Williams under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Desmond Williams, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 14, paragraphs 1 and subparagraphs 3 (a), (b), (c) and (e) of the International Covenant on Civil and Political Rights. He is represented by Ms. K. Aston.

Facts as submitted by the author

2.1 The author was taken into custody in June 1985 in connection with the murder, on 29 May 1985 in the Parish of St. Andrew, of Ernest Hart. On 9 July 1985, after having been identified by the deceased's son and wife, Rafael and Elaine Hart, at an identification parade, he was charged with Mr. Hart's murder. On 5 October 1987, he was found guilty as charged and sentenced to death.

2.2 The Court of Appeal dismissed Mr. Williams' appeal on 21 June 1988. His petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 23 July 1992. With this, it is submitted, all available domestic remedies have been exhausted. The offence for which the author was convicted has been classified a capital offence under the Offences against the Person (Amendment) Act 1992.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Ms. Laure Moghaizel, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

2.3 The prosecution's case rested on identification evidence. The deceased's son testified that, on 29 May 1985, at about 2.30 a.m., he was awakened by his mother. Before he could leave his bed, he heard the door of the living room being kicked open, immediately followed by gunshots. He left his room and was confronted by two men, one armed with a knife ("the knifeman"), the other with a gun ("the gunman"). The "knifeman", whom he later identified as the author, ordered him to turn on the light and to hand over all their money. He told the men that the house was not connected to the electricity network and that money was likely to be found under his mother's mattress. Once in his parents' bedroom, he was ordered to lift the mattress; the "knifeman", who was standing next to him, lit a piece of paper with a match and searched for the money. Nothing was found, however, and the knifeman proceeded to search the room with the aid of the light of burning pieces of newspaper. After both men left, he went to the living room where he found his father lying in a pool of blood across the doorway. Rafael Hart further testified that he was with both men for about 13 minutes and that, aided by street lights shining into the living room and by the light of the burning newspaper, he had every opportunity to observe the author's face.

2.4 The deceased's wife testified that, alerted by a noise outside the house, she warned her husband and went to her son's bedroom; she then hid herself under the bed, from where she heard a peculiar voice demanding money from her son. Although she never saw the face of the author, she identified him by his high-pitched voice at the identification parade.

2.5 The post-mortem examination revealed that Mr. Hart had been shot three times with a light weapon, fired from a distance of at least 18 inches. The gunman was never traced by the police.

2.6 The author's defence was based on an alibi. Desmond Williams did not give evidence; his father testified on his behalf, stating that his son had been with him all the time and could not have committed the crime.

2.7 As to the exhaustion of domestic remedies, the author concedes that he has not applied to the Supreme (Constitutional) Court of Jamaica for redress. He argues that a constitutional motion in the Supreme Court would inevitably fail, in the light of the precedent set by the Judicial Committee's decisions in DPP v. Nasralla[31] and Riley et al. v. Attorney General of Jamaica,[32] in which it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law. Since the author claims unfair treatment under the law, and not that post-constitutional laws are unconstitutional, a constitutional motion would not be an effective remedy in his case. He further argues that, even if it were accepted that a constitutional motion is a remedy to be exhausted, it would not be available to him because of his lack of funds, the absence of legal aid for the purpose and the unwillingness of Jamaican lawyers to represent applicants on a pro bono basis for the purpose.

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[31] (1967) 2 ALL ER 161.

[32] (1982) 2 ALL ER 469.

Complaint

3.1 The author claims a violation of article 14, paragraph 1, as no evidence was submitted that he ever held or fired the gun and that, accordingly, he should have been convicted of murder only if the jury was satisfied that he was a party to a common design in which it was intended to cause death or serious injury. Counsel refers to passages of the judge's summing-up to the jury, and submits that the trial judge failed to provide adequate direction to the jury regarding the degree of violence that must be contemplated by the intruders in order to justify a murder conviction. In that context, it is submitted that it took the jury less than 10 minutes to return its verdict; according to counsel, the short duration of the jury's deliberation indicates that it considered only the issue of whether the author was the knifeman and not whether, if he was the knifeman, he was party to a common design in which it was intended to cause death or serious injury.

3.2 Furthermore, counsel states that the author was not represented by a lawyer at the identification parade, in breach of rule 554A of the Jamaica Constabulary Force (Amendment) Rules 1977, as the police officer in charge of the parade was unaware of that requirement. The Court of Appeal dismissed that ground of appeal, following its earlier judgement, in R. v. Graham and Lewis (SCCA Nos. 158 and 159/81), that rules for the conduct of identification parades are not mandatory but procedural and that failure to observe those rules affect only the weight of evidence and not the validity of the parade. Counsel contests the Court of Appeal's findings and points out that the language used in rule 554A ("an attorney-at-law shall be present") is of an imperative nature; she submits that the identification parade was invalid, and that therefore the identification evidence should not have been admitted in the judicial proceedings against the author.[33]

3.3 As to violation of article 14, subparagraph 3 (a), it is submitted that the author was detained for six weeks before being charged with the offence for which he was subsequently convicted.

3.4 The author claims that he did not have adequate time and facilities for the preparation of his defence, in violation of article 14, subparagraph 3 (b). He states that he met with his legal representative only on the first day of the trial, after having been in custody for more than two years. The attorney advised him not to give evidence at the trial. The author complains that he had no opportunity to reflect upon this advice. He further complains that the attorney did not call his girlfriend, D.O., to testify on his behalf, in spite of his instructions to do so. In that context, he refers to an affidavit, dated 17 February 1993, signed by D.O., wherein she states that she was not called to court even though she was willing to give evidence on the author's behalf. She further states that on 29 May 1985, from 9.45 p.m. onwards, the author was with her at home.[34] The author claims that the attorney's failure to call D.O. to testify violated his rights under article 14, subparagraph 3 (e). With regard to the preparation of his appeal, the author claims that he met with counsel for the appeal only once, shortly before the hearing.

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[33] It appears, however, from the judgment of the Court of Appeal, that prior to the identification parade the author was asked whether he had a lawyer whom he would have wished to be present at the parade and that the author answered in the negative. A justice of the peace and the author's father were present at the parade.

[34] However, it is clear that the crime had occurred in the early morning hours of 29 May 1985.

3.5 The author points out that he was arrested on 9 July 1985 and tried from 1 to 5 October 1987, i.e., almost 27 months later. It is submitted that the delay in the hearing of the case was prejudicial to the author, in particular since the case against him was solely based on identification evidence. This is said to amount to a violation of article 14, subparagraph 3 (c), of the Covenant.

State party's observations and author's comments thereon

4. By its submission of 6 April 1994, the State party argues that the communication is inadmissible because the author has failed to exhaust domestic remedies. It notes that the author may still apply for constitutional redress; in that context it observes that the rights invoked by the author and protected by article 14, paragraph 1 and subparagraphs 3 (a), (b), (c) and (e), are coterminous with sections 20 (1) and (6) (a), (b) and (d) of the Jamaican Constitution. Pursuant to section 25 of the Constitution, the author may seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

5. In her comments, dated 3 February 1995, author's counsel states that since legal aid is not made available for constitutional motions, a constitutional motion does not constitute an effective remedy in the author's case.

Committee's decision on admissibility

6.1 During its fifty-fourth session, the Committee considered the admissibility of the communication. It noted the State party's argument that a constitutional remedy was still open to the author and recalled that the Supreme Court of Jamaica had allowed some applications for constitutional redress in respect of breaches of fundamental rights after criminal appeals in those cases had been dismissed. The Committee recalled, however, that the State party had indicated that legal aid is not made available for constitutional motions; in the absence of legal aid, a constitutional motion could not be deemed to constitute an available remedy to an indigent convict and need not be exhausted for purposes of the Optional Protocol. Accordingly, article 5, subparagraph 2 (b), of the Protocol did not bar the Committee from considering the case.

6.2 As to the author's allegations relating to evaluation of evidence and the instructions given by the judge to the jury, the Committee recalled its established jurisprudence, namely that in principle, it is for the appellate courts of States parties to the Covenant and not for the Committee to evaluate facts and evidence in any given case. Similarly, it was not for the Committee to review specific instructions to the jury by the trial judge, unless it could be ascertained that those instructions were clearly arbitrary or amounted to a denial of justice. As no such irregularities were discernible in the author's case, the Committee deemed that part of the case inadmissible under article 3 of the Optional Protocol.

6.3 The Committee considered that the author and his counsel had substantiated the remaining claims, which appeared to raise issues under article 14 of the Covenant. On 6 July 1995, therefore, the communication was declared admissible under article 14 of the Covenant.

State party's observations on the merits

7.1 By its submission dated 18 October 1995, the State party provides observations on the merits of the author's allegations. With respect to the allegation of a breach of article 14, subparagraph 3 (a), because Mr. Williams was detained for six weeks before he was informed of the charges against him, the State party promises an investigation. By 1 March 1997, however, the State party had not informed the Committee of the results, if any, of its inquiry.

7.2 The State party refutes the allegation that there was a violation of article 14, subparagraphs 3 (b) and (e), because the author met with his lawyer only on the first day of the trial and because his representative did not call a potential alibi witness. The State party notes that if counsel met with Mr. Williams only on the opening day of the trial, she could and should have sought an adjournment; there is no evidence that she did so. Her decision not to call D.O. as a witness was a matter of judgement relating to the best conduct of the defence, something for which the State party cannot be held accountable. In this context, it is submitted that once the State party has provided the accused with competent counsel and has not, by act or by omission, obstructed counsel in the discharge of his duties, then the issue of how counsel conducts the defence is not the State party's responsibility. In this respect there is no difference between the State's responsibility for the conduct of privately retained counsel and its responsibility for the conduct of a legal aid representative.

7.3 According to the State party, there can be no question of a violation of article 14, subparagraph 3 (c), as a result of a delay of more than two years between arrest and trial: a preliminary inquiry was held during that time and there is no evidence that the delay between arrest and trial prejudiced the author's interests.

8. Author's counsel was provided an opportunity to comment on the State party's observations. No comments have been received.

Examination on the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information made available by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol.

9.2 Article 14, subparagraph 3 (a), gives the right to everyone charged with a criminal offence to be informed "promptly and in detail in a language which he understands of the nature and cause of the charge against him". The author contends that he was detained for six weeks before he was charged with the offence for which he was later convicted. For the purposes of article 14, subparagraph 3 (a), detailed information about the charges against the accused must not be provided immediately upon arrest, but with the beginning of the preliminary investigation or the setting of some other hearing which gives rise to a clear official suspicion against the accused.[35] While the file does not reveal on what specific date the preliminary hearing in the case took place, it transpires from the material before the Committee that Mr. Williams has been informed of the reasons for his arrest and the charges against him by the time the preliminary hearing started. In the circumstances of the case, the Memorandum of Understanding Committee cannot conclude that Mr. Williams was not informed of the charges against him promptly and in accordance with the requirements of article 14, subparagraph 3 (a), of the Covenant.

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[35] See the Committee's General Comment 13[21] of 12 April 1984, para. 8.

9.3 The right of an accused person to have adequate time and facilities for the preparation of his defence is an important aspect of the guarantee of a fair trial and an important aspect of the principle of equality of arms. Where a capital sentence may be pronounced on the accused, sufficient time must be granted to the accused and his counsel to prepare the trial defence. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. The author also alleges that he could not obtain the attendance of one alibi witness. The Committee notes, however, that the material before it does not reveal that either counsel or the author ever complained to the trial judge that the time for preparation of the defence had been inadequate. If counsel or the author felt inadequately prepared, it was incumbent upon them to request an adjournment. Furthermore, there is no indication that counsel's decision not to call D.O. as a witness was not based on the exercise of her professional judgement or that, if a request to call D.O. to testify had been made, the judge would have disallowed it. In those circumstances, there is no basis for finding a violation of article 14, subparagraphs 3 (b) and (e).

9.4 The author has claimed a violation of article 14, subparagraph 3 (c), because of "undue delays" in the criminal proceedings and a delay exceeding two years between arrest and trial. The State party has, in its submission on the merits, simply argued that a preliminary inquiry was held during the period of pre-trial detention, and that there is no evidence that the delay was prejudicial to the author. By rejecting the author's allegation in general terms, the State party has failed to discharge the burden of proof that the delays between arrest and trial in the instant case was compatible with article 14, subparagraph 3 (c); it would have been incumbent upon the State party to demonstrate that the particular circumstances of the case justified prolonged pre-trial detention. The Committee concludes that in the circumstances of the instant case, there has been a violation of article 14, subparagraph 3 (c).

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, subparagraph 3 (c), of the Covenant.

11. The Committee is of the view that Mr. Desmond Williams is entitled, under article 2, subparagraph 3 (a), of the Covenant, to an appropriate remedy, including, in any event, the commutation of the death sentence.

12. Bearing in mind that by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

N. Communication No. 572/1994; Hezekiah Price v. Jamaica (Views adopted on 6 November 1996, fifty-eighth session)

Submitted by:	Hezekiah Price (represented by Mr. Saul Lehrfreund of Simons Muirhead & Burton)
Victim:	The author
State party:	Jamaica
Date of communication:	23 September 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 November 1996,

Having concluded its consideration of Communication No. 572/1994 submitted to the Human Rights Committee by Mr. Hezekiah Price under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol*

1. The author of the communication is Mr. Hezekiah Price, a Jamaican citizen, currently imprisoned at the General Penitentiary, Kingston, Jamaica, serving a life term. The author claims to be a victim of a violation by Jamaica of article 14, subparagraphs 3 (c) and (d) and paragraph 5, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author:

2.1 The author was arrested on 19 June 1983 and charged with the murder of his common-law wife earlier that same day. On 26 January 1984, after a trial in the St. Catherine Circuit Court, he was found guilty of murder and sentenced to death.

2.2 The author's application for leave to appeal was dismissed by the Court of Appeal on 29 November 1985. A note of oral judgment was delivered on 6 October 1987. At the beginning of 1989 the author's sentence was commuted to life imprisonment.

2.3 The prosecution's case was based on evidence given by eye-witnesses, who had heard the author and his common-law wife quarrelling. They testified that when the author and his wife came out of the house, he held her by the arm, beat her with the flat of a machete, and when she had fallen on the ground, he killed her with several sharp blows of the machete. The author then walked to the police station to give himself up. The case for the accused was based on self-defence. The judge also put the defence of provocation before the jury.

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* Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not participate in the examination of the communication.

Complaint

3.1 The author claims that he did not have a fair trial. More particularly he claims that his right under article 14, subparagraph 3 (d), was violated. An application for leave to appeal was filed with the Court of Appeal on the grounds of unfair trial and insufficient evidence to warrant a conviction. The legal aid lawyers who were instructed to conduct the appeal did not consult with the author before the hearing. Moreover, it appears from the note of the oral judgment that counsel for the author advised the Court of Appeal during the hearing that he could find no grounds for the appeal to be allowed. The author claims that, had he known that counsel would not put forward any grounds of appeal, he would have asked to have different legal aid counsel assigned to his case.

3.2 The author also claims that the failure of the Court of Appeal to produce a written judgment in his case constitutes a violation of article 14, subparagraph 3 (c) and paragraph 5, since this failure effectively barred him from appealing to the Judicial Committee of the Privy Council.

State party's observations on admissibility and author's comments thereon

4. By submission of 11 November 1994, the State party argues that the communication is inadmissible under article 5, subparagraph 2 (b), of the Optional Protocol, because the author has failed to exhaust domestic remedies. It notes that the author may still appeal to the Judicial Committee of the Privy Council by way of petition for special leave to appeal. The State party adds that the author may still apply for constitutional redress; in this context, it notes that the rights invoked by the author and protected by article 14, subparagraphs 3 (c) and (d), are coterminous with sections 20(6) and 110 of the Jamaican Constitution. Pursuant to section 25 of the Constitution, it is open to the author to seek redress for the alleged violations of his rights by way of a constitutional motion to the Supreme Court.

5. In his comments, dated 30 January 1995, the author's counsel states that he has been advised by leading counsel that there were no grounds upon which to petition the Privy Council and concludes there are no effective domestic remedies that the author should still exhaust. He further states that, since legal aid is not made available for constitutional motions, a constitutional motion does not constitute an effective remedy in this case.

Committee's decision on admissibility

6.1 During its fifty-fourth session, the Committee considered the admissibility of the communication. The Committee found that the formal requirements of admissibility under article 5, subparagraphs 2 (a) and (b), of the Optional Protocol had been met.

6.2 The Committee considered that author's counsel had failed, for purposes of admissibility, to present sufficient elements that would substantiate a possible violation of article 14, subparagraph 3 (c). In particular, author's counsel had not argued that, in the specific circumstances of Mr. Price's case, an earlier written judgment or note of oral judgment would have led to a different result.

6.3 The Committee considered that the author and his counsel had sufficiently substantiated, for purposes of admissibility, a possible violation of article 14, subparagraph 3 (d). The Committee recalled its jurisprudence that "measures must be taken to ensure that counsel, once assigned, provides effective representation in the interests of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue before the appeal court that the appeal has no merits".[36] The Committee found that this part of the communication needed to be examined on the merits.

6.4 The Committee considered that the author and his counsel had failed to substantiate for purposes of admissibility, that the communication raised issues under article 14, paragraph 5, of the Covenant.

6.5 On 21 July 1995, therefore, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under article 14, subparagraph 3 (d), of the Covenant.

State party's observations on the merits and counsel's comments thereon

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 19 February 1996, the State party reiterates that the communication is inadmissible for non-exhaustion of domestic remedies.

7.2 On the alleged breach of article 14, subparagraph 3 (d), because counsel did not argue the author's appeal, the State party contends that it has a duty to provide competent legal aid counsel to represent poor persons, thereafter the manner in which counsel represents the accused cannot be attributed to the State party.

8. In his comments on the State party's submission, counsel rebuts the State party's contention that domestic remedies are still open to the author and reiterates that the State party is responsible for the quality of legal aid counsel, and refers to the Committee's jurisprudence.

Examination on the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 Counsel has claimed that Mr. Price was not effectively represented on appeal, and the Committee notes that the Court of Appeal Judgement shows that Mr. Price's legal aid counsel for appeal conceded at the hearing that there was no merit in the appeal. The Committee notes that the matter would appear also to raise an issue under article 14, subparagraph 3 (b), of the Covenant, but that it is precluded from examining whether such a violation has occurred, as this claim was never raised by counsel. The Committee recalls its earlier jurisprudence[37] that while article 14, subparagraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the appeal by the lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgment, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. The Committee is of the opinion that Mr. Price should have been informed that his counsel was not going to argue any grounds in support of the appeal so that he could have considered any remaining options open to him. In the circumstances, the Committee finds that Mr. Price was not effectively represented on appeal, in violation of article 14, subparagraph 3 (d), of the Covenant.

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[36] Communication No. 253/1987 (Kelly v. Jamaica), Views adopted on 8 April 1991, para. 5.10.

[37] See, *inter alia*, the Committee's Views in respect of Communication No. 459/1991 (Osbourne Wright and Eric Harvey v. Jamaica), adopted on 27 October 1995, para. 10.5, and Communication No. 461/1991 (George Graham and Arthur Morrison v. Jamaica), adopted on 25 March 1996, para. 10.5.

9.3 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 [16], the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of the conviction and sentence by a higher tribunal". In the present case, since the final sentence of death was passed without having observed the requirement of effective representation on appeal as set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated. The Committee notes that the State party has commuted the author's death sentence and considers that this constitutes sufficient remedy for the violation of article 6, paragraph 2, in this case.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, subparagraph 3 (d), of the Covenant.

11. Pursuant to article 2, subparagraph 3 (a), of the Covenant, the author is entitled to an appropriate remedy. The State party is under an obligation to ensure that similar events do not occur in the future.

12. Bearing in mind, that by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

O. Communication No. 587/1994; Irvine Reynolds v. Jamaica (Views adopted on 3 April 1997, fifty-ninth session)*

Submitted by:	Irvine Reynolds [represented by Mr. A. R. Poulton]
Victim:	The author
State party:	Jamaica
Date of communication:	26 April 1994 (initial submission)
Date of decision on admissibility:	6 July 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1997,

Having concluded its consideration of Communication No. 587/1994 submitted to the Human Rights Committee on behalf of Mr. Irvine Reynolds under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Irvine Reynolds,[38] a Jamaican citizen at the time of submission of the communication awaiting execution at St. Catherine District Prison, Jamaica. The author's death sentence was commuted on 13 March 1995, after his offence had been reclassified as non-capital. Mr. Reynolds claims to be a victim of violations by Jamaica of articles 6, 7, 10, paragraph 1, and article 14, paragraphs 1, 3 and 5, of the International Covenant on Civil and Political Rights. He is represented by Mr. A. R. Poulton.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Ms. Laure Moghaizel, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[38] An earlier communication by Mr. Reynolds, No. 229/1987, alleged several irregularities during the trial against him. The Committee adopted its Views with regard to communication No. 229/1987 on 8 April 1991, finding no violation (CCPR/C/41/D/229/1987).

Facts as submitted by the author

2.1 Irvine Reynolds was - together with a co-defendant, Errol Johnson[39] - convicted of the murder of one Reginald Campbell and sentenced to death in the Clarendon Circuit Court on 15 December 1983. His appeal was dismissed by the Court of Appeal of Jamaica on 29 February 1988. The Judicial Committee of the Privy Council dismissed his petition for special leave to appeal on 9 July 1992.

2.2 At the trial, the case for the prosecution was that on 31 October 1982 between 6 and 9 a.m., Reginald Campbell was stabbed to death by Irvine Reynolds who had ransacked his shop. During the trial, two witnesses testified that they had seen Irvine Reynolds and Errol Johnson on the morning of 31 October 1982 near the shop of Mr. Campbell. Mr. Reynolds (but not Mr. Johnson) was identified on 12 November 1992 by one of the witnesses as the man standing outside the shop. The other witness identified both defendants as the men having walked past the shop. In a police search, cheques signed by Mr. Campbell were found in Mr. Reynolds' room. In a statement made under caution, Errol Johnson declared that he had seen Mr. Campbell lie bleeding on the ground, and Mr. Reynolds aside with a knife in his hands. Mr. Reynolds himself claimed in an unsworn statement from the dock that he had an alibi.

Complaint

3.1 Counsel argues that the delay between the trial and the appeal (51 months) amounts to a violation of article 14, paragraphs 1, 3 and 5, of the Covenant. In this connection, counsel refers to the Committee's Views in the author's earlier Communication No. 229/1987, where the Committee considered the delay in the light of the admissibility of the communication, and concluded that such delays as occurred in the pursuit of domestic remedies were not attributable to the author or his counsel. In its Views, however, the Committee did not address the issue on the merits. Counsel argues that the delay between the author's conviction and the Court of Appeal hearing was wholly attributable to the State party. He refers to a letter from the Registrar of the Court of Appeal, dated 14 July 1986, in which the Registrar confirmed that the appeal was not ready for hearing as the Court of Appeal had not yet received the transcript. Counsel argues that the failure to give the author access to the trial transcript within a reasonable time effectively denied him his right to have his conviction and sentence reviewed by a higher tribunal according to law.

3.2 Counsel points out that the author has been on death row since 15 December 1983 and that this delay would render his execution cruel, inhuman and degrading treatment, within the meaning of article 7 of the Covenant. In support of this argument, counsel refers, inter alia, to jurisprudence of the Privy Council (Earl Pratt and Ivan Morgan v. Attorney General of Jamaica, judgment of 2 November 1993).

3.3 The author states that he has repeatedly been the victim of threats and beatings by warders at St. Catherine District Prison, in violation of articles 7 and 10, paragraph 1, of the Covenant. On one occasion, on 9 July 1988, during a search of the prison by warders, soldiers and police, the author was allegedly beaten with guns and batons all over his body, stripped of his clothes and stabbed with a knife. On another occasion, on 4 May 1993, the author was allegedly kicked in his testicles by soldiers. Although he suffered pain, he did not receive any medication. Reference is made to the Standard Minimum Rules of the Treatment of Prisoners and to a report by Amnesty International of December 1993 ("Jamaica - Proposal for an Inquiry into Death and Ill-Treatment of Prisoners").

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[39] Mr. Johnson's communication was registered before the Committee as communication No. 588/1994. Views were adopted by the Committee on 22 March 1996.

3.4 It is finally argued that a death sentence imposed after a trial in which provisions of the Covenant have been violated constitutes a violation of article 6, paragraph 2, of the Covenant, if no further appeal against the sentence is possible.

3.5 With regard to the exhaustion of domestic remedies, counsel affirms that the author has not applied to the Supreme Court of Jamaica for constitutional redress, as a constitutional motion would inevitably fail in view of the precedent set by the Judicial Committee of the Privy Council in the case of D. D. P. v. Nasralla and Riley v. Attorney General of Jamaica - where it was held that the Jamaican constitution was intended to prevent the enactment of unjust laws and not merely, as claimed by the victim, unfair treatment under the law. In any case, it is argued, constitutional remedies are not available to the author in practice, as he lacks the necessary funds to secure legal representation. In this context, reference is made to the established jurisprudence of the Human Rights Committee.

3.6 As regards the author's claim of ill-treatment, it is stated that, on 9 July 1988 and on 16 November 1993, the author and his legal representative asked the Ombudsman to look into various allegations of beatings at the prison. Although the Ombudsman replied that the incidents were being investigated, no further reply has been received. In this context, it is argued that the Office of the Ombudsman does not function efficiently and therefore is not an effective remedy. Counsel submits that all available domestic remedies have been exhausted.

State party's observations on admissibility and the author's comments thereon

4.1 By submission of 15 December 1994, the State party argues that the communication is inadmissible for non-exhaustion of domestic remedies. It refers to the case of Albert Huntley v. the Attorney General of Jamaica before the Judicial Committee of the Privy Council, which is a constitutional challenge to the classification procedure under the Offences Against the Persons (Amendment) Act. The State party argues that the outcome of that case is relevant to the author's communication since it may affect the classification of the author's offence as capital or non-capital murder.

4.2 The State party submits that it will investigate the author's allegations of ill-treatment in prison and that it will forward the results of the investigation as soon as they are available.

4.3 The State party rejects the argument that the delay between trial and appeal constitutes a breach of article 14 of the Covenant. In this connection, the State party argues that the fact that the author had his case reviewed by the highest court in Jamaica, the Privy Council, shows that it cannot be asserted that the author's right to have his trial and conviction reviewed by a higher tribunal has been violated.

5.1 In his comments on the State party's submission, dated 21 March 1995, the author states that the Privy Council judgment in Albert Huntley v. the Attorney General of Jamaica[40] has now been given and that it does not affect the author's communication before the Committee. The author argues that, since his offence has been classified as capital, he is therefore entitled to allege violations of article 6.

5.2 As regards the delay between trial and appeal, the author explains that it is the delay of 51 months itself which is in violation of article 14, and that the fact that he had his case reviewed by the Privy Council is irrelevant to his claim.

5.3 By further submission of 6 April 1995, the author informs the Committee that following a Classification Review on 13 March 1995, his offence has been reclassified as non-capital, with the recommendation that he serve 15 years before being eligible for parole. According to counsel, the author would be eligible for parole in December 1998.

5.4 The author confirms that he wishes to pursue his communication.

Committee's decision on admissibility

6.1 At its fifty-fourth session, the Committee considered the admissibility of the communication. As regards the author's claim that the period of 51 months between trial and appeal hearing constitutes a violation of article 14, the Committee noted that the author's claims of unfair trial were already brought before the Committee in his earlier communication,[41] upon which the Committee had decided that the facts did not disclose a violation of any of the provisions of the Covenant. The Committee considered therefore that this claim was now inadmissible.

6.2 Consequently, the author's claim that the imposition of the death sentence after an unfair trial constituted a violation of article 6, paragraph 2, of the Covenant, was also inadmissible.

6.3 As regards the author's claim that his prolonged detention on death row amounted to a violation of article 7 of the Covenant, the Committee recalled that although some national courts of last resort had held that prolonged detention on death row for a period of five years or more violated their constitutions or laws,[42] the jurisprudence of this Committee remained that detention for any specific period would not be a violation of article 7 of the Covenant in the absence of some further compelling circumstances.[43] The Committee observed that the author had not substantiated, for purposes of admissibility, any specific circumstances of his case that would raise an issue under article 7 of the Covenant. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

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[40] Judgment of 12 December 1994.

[41] Communication No. 229/1987, Views adopted by the Committee on 8 April 1991.

[42] See, inter alia, the judgment of the Judicial Committee of the Privy Council, dated 2 November 1993 (Pratt and Morgan v. Jamaica).

[43] See the Committee's Views on Communication No. 210/1986 and Communication No. 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), adopted on 6 April 1989, para. 12.6. See also, inter alia, the Committee's Views on Communication No. 270/1988 and Communication No. 271/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, and Communication No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993.

6.4 The Committee considered that the author had sufficiently substantiated, for purposes of admissibility, his claim that he had been ill-treated in prison. It noted that the State party had raised no objection to admissibility of the claim and that it had stated that it would investigate the allegations.

7. Accordingly, on 6 July 1995, the Human Rights Committee decided that the communication was admissible insofar as it might raise issues under articles 7 and 10, paragraph 1, of the Covenant, in respect of the alleged ill-treatment in detention.

State party's submission on the merits and counsel's comments thereon

8. By submission of 19 February 1996, the State party comments that its undertaking that it will investigate the matter does not constitute an admission as to the merits of the allegation. The State party confirms that disturbances occurred on 8 July 1988[44] and 4 May 1993 at the prison, but adds that it is unable to address the particular allegations of ill-treatment made by the author, but that it would pursue the matter and inform the Committee as to the results of its further inquiries.

9. In his comments on the State party's submission, counsel for the author notes that the State party has not provided the results of its investigations into the author's allegations nor copies of his medical record. Counsel argues that the acknowledgement of the disturbances on 8 July 1988 and 4 May 1993 is a prima facie admission of the truth of the matters alleged by the author.

Issues and proceedings before the Committee

10.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with regret that, more than two years after the allegations of ill-treatment were brought to the attention of the State party, the State party has not furnished the results of its investigations, but merely states that it was unable to address the particular allegations of ill-treatment made by the author. In the circumstances, due weight must be given to the author's allegations, to the extent that they are substantiated.

10.2 The author has claimed that on 9 July 1988, he was in his cell when soldiers and warders were conducting a search. His cell was opened, and he was beaten up by three men with guns and batons. Later, in the corridor he was stripped of his clothes, beaten, stabbed and hit with a metal detector. A warder, whom the author has mentioned by name, allegedly told the soldiers to kill the author. The items the author had in his cell were destroyed and his clothes and sleeping mat were drenched with water. The author was then locked away without receiving any medical treatment. He then complained to the Parliamentary Ombudsman by letter of 9 July 1988, to which he received no reply.

10.3 The author has alleged further incidents of ill-treatment and named the warders responsible. In particular, he has claimed that on 4 May 1993, during a search, he was taken out of his cell and kicked twice, once in his testicles, and that he was denied painkillers or other medical treatment afterwards.

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[44] In their submissions on the merits, both State party and counsel refer to an incident on 8 July 1988, whereas the allegations made by the author refer to an incident on 9 July 1988.

10.4 The Committee considers that, in absence of any concrete information from the State party, the treatment as described by the author constitutes treatment prohibited by article 7 of the Covenant and is likewise in violation with the obligation under article 10, paragraph 1, of the Covenant, to treat prisoners with humanity and with respect for the inherent dignity of the human person.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

12. Under article 2, subparagraph 3 (a), of the Covenant, the State party is under an obligation to provide an effective remedy to the author, entailing compensation. The State party must take measures to ensure that similar violations do not occur in the future. In this context, the Committee wishes to emphasize that investigations into allegations of ill-treatment should be carried out expeditiously and without delay.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure that all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

P. Communication No. 607/1994; Michael Adams v. Jamaica (Views adopted on 30 October 1996, fifty-eighth session)

Submitted by:	Michael Adams (represented by Mr. Saul Lehrfreund of Simons Muirhead and Burton)
Victim:	The author
State party:	Jamaica
Date of communication:	1 November 1994 (initial submission)
Date of decision on admissibility:	30 October 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 1996,

Having concluded its consideration of Communication No. 607/1994 submitted to the Human Rights Committee by Mr. Michael Adams under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[*]

1. The author of the communication is Michael Adams, a Jamaican citizen who, at the time of submission of his complaint, was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 7, article 10, paragraph 1, and article 14, paragraphs 1 and 2 and subparagraphs 3 (b) and (e), of the International Covenant on Civil and Political Rights. He is represented by counsel. The author's death sentence was commuted on 14 November 1994.

Facts as submitted by the author

2.1 On 7 March 1991, the author was convicted of murder in the Kingston Home Circuit Court and sentenced to death. He applied for leave to appeal against conviction and sentence; on 24 February 1992, the Court of Appeal of Jamaica, treating the application for leave to appeal as the hearing of the appeal, dismissed the author's appeal. On 4 November 1993, the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed. With this, it is submitted, all domestic remedies have been exhausted. On 14 November 1994, the author was reclassified as a non-capital offender.

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[*] Pursuant to rule 85 of the rules of procedure, Committee member Laurel Francis did not participate in the examination of the communication.

2.2 The author was convicted on the basis of common design. The case for the prosecution was that, on 3 May 1990, the author induced an unidentified man (the gunman) with whom he was allegedly working in concert, to shoot a security guard, one Charles Wilson; the gunman however killed another person, one Alvin Scarlett.

2.3 On the morning of 3 May 1990, Mr. Wilson was on duty at the entrance gate to the dump of a bottling plant compound on the Spanish Town Road, Kingston. At approximately 8 a.m., he allowed two trucks to enter the dump from the compound. Several men climbed on the first truck. During the trial, Charles Wilson testified that he had seen two men, one of whom he identified in court as the author, sitting by the side of the dump's enclosure; the author followed the second truck down to the dump on foot. Fifteen minutes later, the second truck returned, with Alvin Scarlett, one Carlton McKie and the author; it stopped at the gate, and the three men unloaded some pallets. As the truck slowly entered the compound, Mr. Wilson began closing the gate, he heard a gunshot and felt a pain in his hand. He saw the other man, who had been by the fence with the author, pointing a gun at him. Mr. Wilson was unable to draw his own gun because of the hand injury. He testified that he saw the author, who had been out of sight, walk around the truck, saying to the gunman: "Shot the guard boy, let we get his gun". He then escaped, pursued by the author and the gunman. While running, he heard three more gunshots. The two men then gave up chasing him, and he saw their backs as they ran back towards the dump.

2.4 Mr. Wilson claimed that he had first seen the author three years earlier, when he was working as a security guard at a biscuit factory, and that the author used to ask him for biscuits. He had seen him once before at the dump, but had not spoken to him.

2.5 Carlton McKie testified that, while unloading the pallets, he saw a man firing at the guard, and Alvin Scarlett, who was standing in the back of the truck, fell on his back. He had then seen the author on the other side of the truck and that the author and the gunman had pursued the guard for some distance and then ran back towards the dump. Mr. McKie further testified that he had known the author for about one year and that during this period he had often seen the author at the dump.

2.6 Blandford Davis, the investigating officer of the Hunts Bay Police Station, testified that, on 4 May 1990, he obtained a warrant for the author's arrest; on 4 June 1990, he saw the author at the Police Station and arrested and charged him with the murder of Alvin Scarlett. Under arrest, the author claimed to be innocent.

2.7 The case for the defence was based on sworn evidence given by the author. He denied having been waiting by the side of the enclosure together with another man and testified that he had gone down to the dump with a group of men. As they reached the premises of the bottling plant, the truck was about to pass the gate, and he and six other men had climbed on board. On returning from the dump, he and Mr. Scarlett, whom he had known for four years, unloaded the pallets. The author said he heard a gunshot while he was on the other side of the truck and could not see Mr. Wilson; he could not say from which direction the gunshot came. He further stated that he and others ran away, that he did not speak to anyone, and that he was not aware of anyone running in front of him. He heard several more shots and ran home. Later, he returned to the premises of the bottling plant to retrieve the pallets; he learned that Alvin Scarlett had been killed. The author denied ever having said "Shot the guard boy, let we get his gun", or having chased Charles Wilson; he stated that he had seen Mr. Wilson at the premises of the bottling plant prior to 3 May 1990, but denied ever having seen him at the biscuit factory.

2.8 The trial transcript reveals that Mr. Wilson first mentioned the author's utterance "Shot the guard boy, let we get his gun" in a written statement to the police; he did not repeat it during the preliminary enquiry at the Gun Court but did mention it again during the trial, during the examination-in-chief by crown counsel. It further appears that the author's attorney (who had not represented him at the preliminary enquiry) was not aware of the written statement and, when cross-examining Mr. Wilson, challenged that the author had ever said those words. In re-examination, crown counsel showed the written police statement to the author's attorney and requested the judge admit it in evidence; with reference to established jurisprudence he argued that if a statement made by a witness during examination-in-chief is challenged on the basis that it is a recent concoction, it is open to the prosecution to tender a written statement made previously, to show that the statement was in fact made. The author's attorney opposed the admission of the written statement as an exhibit, on the ground that it was self-serving, self-corroborating evidence of the witness. The judge, however, allowed the statement to be admitted in evidence to rebut the suggestion of recent fabrication.

Complaint

3.1 It is claimed that the non-disclosure of the statement to the defence prior to the trial violated the author's rights under article 14, paragraphs 1 and 2 and subparagraphs 3 (b) and (e) of the Covenant.

3.2 In this respect, counsel quotes from a letter received from the author's previous representative in Jamaica: "I think the point which turned the scales against Michael Adams was the statement by the witness Wilson that he had told the police that Adams said: ... shoot the guard boy mek we get fi him gun. Wilson did not say that at the preliminary enquiry. That was a material difference and that statement ought to have been made available to the defence to ensure a fair trial. If that statement had been disclosed, the cross-examination of Charles Wilson would not have been conducted as it was. In light of this, did Adams receive a fair trial?".

3.3 Counsel points to the Committee's General Comment on article 14 of the Covenant, where it observed in respect of the right of an accused person to have adequate time and facilities for the preparation of his defence that: "[...] the facilities must include access to documents and other evidence which the accused requires to prepare his case". It is submitted that, while the author's attorney in Jamaica affirms that he had sufficient time to prepare the case and was allowed to cross-examine witnesses on the same terms as the prosecution, this could not have been the situation with regard to Mr. Wilson. Counsel reiterates that, had the statement been disclosed to the defence, the attorney's cross-examination of the witness would have been different, and that, consequently, the author was denied adequate facilities for the preparation of his defence as guaranteed by article 14, subparagraph 3 (b). He adds that, without prior knowledge of the statement, further cross-examination by counsel was not as effective as it should have been and was limited by the judge in its scope, amounting to a violation of article 14, subparagraph 3 (e). It is further submitted that the defence was therefore unable to rebut the witness' allegations, contrary to article 14, paragraph 2, and that, consequently, the author was denied the right to a fair trial (article 14, para. 1).

3.4 In support of these claims, counsel refers to the Committee's Views on Communication No. 283/1988 (Aston Little v. Jamaica). He also refers to an affidavit taken by Ms. Shelagh Anne Simmons, who visited Mr. Adams at St. Catherine District Prison from 29 August to 5 September 1994, which states that: "I told my lawyer, [...] that there were witnesses willing to give evidence on my behalf, but he said that the prosecution had so little evidence against me that witnesses would not be needed. The witnesses were people who were on the scene when the crime took place. [...] They can verify that I was never a party to the murder I am charged for. The witnesses were Alfred Campbell [...], a man I know as 'Willy' [...], and a girl called 'Reenie' [...]". Counsel points out that, if Mr. Wilson's statement to the police had been disclosed to the author's attorney, it is likely that he would have called the witnesses mentioned by the author to testify on his behalf. Thus, it is submitted, by denying adequate time and facilities for the preparation of the defence, there has also been a violation of article 14, subparagraph 3 (e), in that the author was unable to obtain the testimony of witnesses on his behalf.

3.5 In affidavits dated 10 September 1994 from the three witnesses mentioned by the author, it appears that all of them, on separate occasions, tried to give statements to the police, specifically to the investigating officer. The witnesses claim that they were "warned off". In this respect, reference is made to a recent judgment of the Court of Appeal of the United Kingdom.[45] Counsel submits that, although the Department of Public Prosecution or the author's attorney had not specifically requested that statements be taken from the three above-mentioned witnesses, the investigating officer was under a duty to investigate and to take statements from witnesses willing to testify on the author's behalf. The failure of the Jamaican police and, in particular, of the investigating officer, to obtain statements from alibi witnesses is said to amount to a violation of article 14, paragraphs 1 and 2.

3.6 Counsel further claims that the trial judge, in his summing-up, misdirected the jury as to the proper approach to be taken on the evidence, which amounted to a denial of justice. He submits that, by allowing the prosecution to tender in evidence the statement Charles Wilson had made to the police, the judge inevitably led the jury to a finding of guilty. In directing the jury on how to use the statement, the judge failed to clarify sufficiently that the statement should not be used to determine whether the remark "shot the guard boy, let we get his gun" was true, but was simply relevant to the credibility of Mr. Wilson as a witness. In addition, he effectively directed the jury not to consider whether Mr. Wilson was mistaken. Further, the judge effectively directed the jury that, by accepting that the statement was made, it was inevitable to conclude that the author must have had the necessary intention to participate in the joint enterprise, at the time the gunman shot Alvin Scarlett. Moreover, during the summing-up, the trial judge repeatedly used the phrase "Shoot the guard boy ...", as opposed to the phrase "shot the guard boy...", used by Mr. Wilson in court and in his statement to the police. Counsel points out that, in doing so, the judge misrepresented the evidence and encouraged the jury to interpret the word "shot" as "shoot".

3.7 Counsel submits that the author is a victim of a violation of articles 7 and 10, paragraph 1, because of ill-treatment by the police after his arrest. The author claims that he spent about six months in custody on a shooting charge before being charged for murder. After his arrest, he was first detained at the

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[45] See Committee's Views on communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996, paras. 8.2 to 8.5.

Spanish Town Police Station, and then transferred to the Hunts Bay Police Station. He claims that, there, he "sustained beatings to my back, chest, neck and foot bottom by policemen, namely Bobby Williams, R. Scott and Detective Corporal Davis, who led these beatings on me which caused me to pass blood in my urine and damage to my nerves. I was beaten over a two week period, twice daily. I was denied visitors or medical treatment by the police. [...] Whenever the police went out in search of men who they say committed the crime without finding them, they always come and beat up on me for information I knew nothing about. I told my lawyer about the beatings, but nothing was done about it".

3.8 The author's claims of ill-treatment by the police appear to be corroborated by the testimony of his aunt, Janet Gayle, who stated in an affidavit dated 10 September 1994, that: "On a visit to Michael at the police station, he informed me that when he was being questioned [...], he stated his innocence and was then beaten by the investigating officers. He said he was beaten at least three or four times a week. When I visited him, I noted that he had open wounds and scars. Michael told me that after one beating he "blacked out" and was taken to a doctor and then back to the police station". She stated that she thought that the trial lawyer was unaware of the author's ill-treatment. She further stated that: "Michael never suffered from epilepsy prior to his beatings while detained. I think he was diagnosed as suffering from epilepsy about one year after the murder trial. Michael has told me that he first "blacked out" after the first beating he received while detained at Spanish Town Police Station. He has also said that he has had episodes of blackout in prison. These have normally occurred after being beaten in prison. In fact, one time I went to visit Michael in prison but was late and the visiting hours had finished. I then went to visit a friend who was in Spanish Town Hospital and to my surprise and horror I saw Michael there with his head cut open and bleeding. [...] Michael is currently on medication for his epilepsy and if he stops the medication he suffers from fits. He is now dependent on that medication. [...]. I think that the beatings trigger the epilepsy fits". Although Janet Gayle refers to the actions of the police at Spanish Town Police Station, the author has confirmed that the beatings actually took place at Hunts Bay Police Station and not at the Spanish Town Police Station.

3.9 In a letter of 18 February 1994 to London counsel, the author explains that: "On several occasions the police [...] took me out of the cell and carried me to the guard room where [they] beat me with pieces of 2 x 4 boards, iron pipes and a pickaxe stick. I sustained several cuts on my head, swollen to my arms and my legs. Internal injury indicative of lots of blood in my urine, and whenever I cough, blood came from my stomach. Several cuts on my back. I was also beaten on the soles of my feet. As a result of being locked away for more than a month, being not able to speak to anyone, I did not go to report the issue of the beatings to anyone before I was taken to Court, and in Court, I was not allowed to speak to anyone throughout the trial".

3.10 Furthermore, on 19 July 1993, Ms. Simmons, a human rights worker from England, made a report to the Jamaica Council for Human Rights on behalf of the author; she stated that on 24 June 1993, the author was viciously assaulted by a warder at St. Catherine District Prison and, as a result, spent three and a half days in the Spanish Town Hospital suffering from head injuries.

3.11 On 20 July 1993, counsel filed a complaint, on the author's behalf, with the Parliamentary Ombudsman of Jamaica, requesting an investigation into the incidents. He also requested the Jamaica Council for Human Rights to ensure that the Ombudsman in fact investigate the matter. On 4 August 1993, the office of the Ombudsman informed counsel that "the complaint would receive the most prompt attention possible". On 3 February and 5 July 1994, counsel requested the Ombudsman about the outcome of the investigations, if any. He states that to date no reply has been forthcoming from the office of the Ombudsman. The Jamaica Council for Human Rights also sent an urgent action request to the Director of the World Organisation against Torture on 1 October 1993. In addition, Father Brian Massie SJ, Chaplin of St. Catherine District Prison, wrote to the Prison Superintendent on 23 July 1993, requesting that the author's allegations be investigated and that a brief report be made available to the Board of Visitors' meeting. On 30 March 1994, Father Massie contacted counsel, explaining that nothing substantial had been done.

3.12 The affidavit taken by Ms. Simmons refers to the fact that, on each of her visits to the author, a warder was present, and that the author told her that he felt uneasy about openly answering questions on his maltreatment by the prison warders, for fear of reprisals. Ms. Simmons adds that she was herself on one day subjected to 30 minutes of humiliating treatment by the Superintendent and certain members of his staff and that her visits to the author were restricted. The Jamaica Council for Human Rights sought to raise the matter with the Commissioner of Correctional Services, but the author preferred that no further action be taken, fearing reprisals from warders. It is submitted that the requirements of the United Nations Standard Minimum Rules for the Treatment of Prisoners were not met during the author's detention at the Hunts Bay Police Station and at St. Catherine District Prison and that the treatment to which he was subjected on 24 June 1993, the inadequate medical treatment he received, as well as the continuing fear of reprisals, amount to violations of articles 7 and 10, paragraph 1.

3.13 Counsel points out that the author has been held on death row for three years and seven months, prior to the commutation of his death sentence to life imprisonment as a result of the reclassification process. Reference is made to the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan,[46] where it was held, inter alia, that it should be possible for the State party to complete the entire domestic appeals process within approximately two years. It is submitted that the delay in the author's case, during which he had to face the agony of execution, amounts to a violation of articles 7 and 10, paragraph 1.

3.14 Finally, reference is made to the findings of a delegation of Amnesty International, which visited St. Catherine District Prison in November 1993. It was observed, inter alia, that the prison is holding more than twice the capacity for which it was constructed in the nineteenth century and that the facilities provided by the State are scant: no mattresses, other bedding or furniture in the cells; no integral sanitation in the cells; broken plumbing, piles of refuse and open sewers; no artificial lighting in the cells and only small air vents through which natural light can enter; almost no employment opportunities available to inmates; no doctor attached to the prison so that medical problems are generally treated by warders who receive very limited training. It is submitted that the particular impact of these general conditions upon the author were that he was confined to his cell for 22 hours a day. He spent most of the day isolated from other men, with nothing to keep him occupied. Much of the time he spent in enforced darkness. He further complained about pains in his chest and about being unable to digest any food, but had not seen a doctor as of 29 August 1994. The conditions under which the author was detained at St. Catherine District Prison are said to amount to cruel, inhuman and degrading treatment within the meaning of articles 7 and 10, paragraph 1.

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[46] Earl Pratt and Ivan Morgan v. Attorney-General of Jamaica; PC Appeal No. 10 of 1993, judgement delivered on 2 November 1993.

State party's information and observations on admissibility and the author's comments thereon

4.1 In a submission, dated 1 June 1995, the State party does not specifically address the admissibility and offers observations on the merits of the case.

4.2 With regard to the claim that the non-disclosure of the statement given by Mr. Wilson to the police constituted a violation of article 14, subparagraph 3 (b), the State party contends that counsel could challenge the defence witnesses' statement at the trial and was therefore not left without any course of action through which to protect his client's interests. It further contends that these matters relate to questions of evidence which, according to the Committee's own jurisprudence, are best left to the appellate courts to decide.

4.3 With respect to the claim that the author was unable to cross-examine witnesses on the same terms as the prosecution, the State party refers to the comments given by the author's lawyer in Jamaica to London counsel and contends that the former's opinion constitutes strong evidence as to the events which occurred, which belie the claim under article 14, subparagraph 3 (b).

4.4 The State party denies that there was a violation of article 14, subparagraph 3 (e). It submits that the author's witnesses were available to him, had he chosen to call them.

4.5 With regard to the alleged misdirections to the jury by the trial judge, the State party contends that this is an issue of evaluation of facts and evidence which is for the appellate courts, rather than the Committee, to decide.

4.6 As to the allegations that the author was ill-treated in police detention, the State party argues that it is significant that Mr. Adams did not bring this to the attention of his counsel and that the author's aunt admits that he was taken to a doctor. With respect to the author's allegation that he was ill-treated in prison, the State party informs that it will investigate the matter and inform the Committee as soon as the results of the investigation are available. No further information had been received as of 1 March 1996.

4.7 As to the "death row phenomenon" claim, the State party contends that the Privy Council's decision in Earl Pratt and Ivan Morgan v. Attorney-General of Jamaica is not an authority for the proposition that incarceration on death row for a specific period of time constitutes cruel and inhuman treatment. Each case must be examined on its own facts, in accordance with applicable legal principles. In support of its argument, the State party refers to the Committee's Views in the case of Pratt and Morgan, where it was held that delays in judicial proceedings did not per se constitute cruel, inhuman or degrading treatment.

5.1 In his comments counsel reaffirms that his client is a victim of violations of articles 14, paragraphs 1 and 2 and subparagraphs 3 (b) and (e). He considers that the non-disclosure of the statement to the defence denied the author the possibility to examine witnesses on equal terms by eliminating the possibility of rebutting the allegation and effectively denying him a fair trial. With regard to the availability of the defence witnesses, these were "frightened off" by the investigation officer; consequently, and contrary to the State party's affirmation, they were not "available" to the author.

5.2 Counsel notes that the State party does not deny the ill-treatment the author was subjected to during detention and at St. Catherine District Prison.

Admissibility consideration and examination of merits

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council on 4 November 1993, the author exhausted domestic remedies for purposes of the Optional Protocol. In this context, it notes that the State party has not specifically addressed the admissibility of the case and has formulated comments on the merits. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that this period may be shortened, in the interest of justice, if the State party so wishes. The Committee further notes that counsel for the author does not object to the examination of the case on the merits at this stage.

6.3 With respect to allegations about irregularities in the court proceedings, in particular improper instructions from the judge to the jury on the evaluation of evidence, such as the statement given by Mr. Wilson to the police, the Committee recalls that it is generally for the courts of States parties to the Covenant to evaluate the facts and evidence in a particular case; similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations do not show that the judge's instructions suffered from such defects. In this respect, therefore, the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7. In respect of the author's remaining claims, the Committee decides that the case is admissible and proceeds, without further delay, to an examination of the substance of his claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 With regard to the author's claim that the length of his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee refers to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant, in the absence of some further compelling circumstances.[47] The Committee observes that the author has not shown how the length of his detention on death row affected him as to raise an issue under articles 7 and 10 of the

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[47] See Committee's Views on Communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996, paras. 8.2 to 8.5.

Covenant. While it would be desirable for appeal proceedings to be conducted as expeditiously as possible, in the circumstances of the present case, the Committee concludes that a delay of three years and seven months does not constitute a violation of articles 7 and 10, paragraph 1.

8.2 With regard to the author's allegation that he was ill-treated the Committee considers that there are two separate issues, the ill-treatment the author suffered during pre-trial detention and later at St. Catherine District Prison. With respect to the ill-treatment during pre-trial detention the Committee notes that the State party has not denied the ill-treatment but has simply stated that the author received medical attention. With regard to the author's alleged ill-treatment at St. Catherine District Prison, the Committee notes that the author has made very precise allegations, which he documented in complaints to the Parliamentary Ombudsman of Jamaica and to the Jamaica Council for Human Rights. The State party has promised to investigate these claims, but has failed to forward to the Committee its findings, almost ten months after promising to do so. In the circumstances, the Committee finds that the author's claims concerning the treatment he was subjected to both during pre-trial detention and at St. Catherine's prison have been substantiated and concludes that articles 7 and 10, paragraph 1, of the Covenant have been violated.

8.3 The author has alleged a violation of article 14, paragraphs 1 and 2 and subparagraphs 3 (b) and (e), in that the non-disclosure, by the prosecution, of the statement made by Mr. Wilson to the police, denied him the possibility of cross-examining witnesses on the same terms as the prosecution and thus denied him adequate facilities for the preparation of his defence. The Committee, however, notes that even though counsel objected to its submission into evidence, from the record it appears that he did not request an adjournment or even ask for a copy of the statement. The Committee considers therefore that the claim has not been substantiated and that consequently there is no violation of the Covenant in this respect.

8.4 The author contends that he was unable to obtain the attendance and examination of witnesses on his behalf on equal terms as witnesses against him, as the witnesses were "warned off" by the police. The State party has not explained why statements were not taken from three potential alibi witnesses, who had on different occasions indicated their willingness to testify on behalf of the author, as attested to by affidavits signed by all three of them. However, the Committee considers that as the witnesses were available to the author, it was counsel's professional choice not to call them. The Committee reaffirms its standard jurisprudence where it has held that it is not for the Committee to question counsel's professional judgement, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using his best judgement. In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7 and 10, paragraph 1, of the Covenant.

10. Pursuant to article 2, subparagraph 3 (a), of the Covenant, the author is entitled to an effective remedy, entailing compensation.

11. Bearing in mind that by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

Q. Communication No. 612/1995; Arhuacos v. Colombia (Views adopted on 29 July 1997, sixtieth session)[*]

Submitted by:	José Vicente and Amado Villafañe Chaparro, Dioselina Torres Crespo, Hermes Enrique Torres Solis and Vicencio Chaparro Izquierdo [represented by Mr. Federico Andreu]
Victims:	José Vicente and Amado Villafañe Chaparro, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres
State party:	Colombia
Date of communication:	14 June 1994 (initial submission)
Date of admissibility decision:	14 March 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1997,

Having concluded its consideration of Communication No. 612/1995, submitted to the Human Rights Committee on behalf of Mr. José Vicente and Mr. Amado Villafañe Chaparro, Mr. Luís Napoleón Torres Crespo, Mr. Angel María Torres Arroyo and Mr. Antonio Hugues Chaparro Torres under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[**]

1. The authors of the communication are José Vicente Villafañe Chaparro and Amado Villafañe Chaparro, filing a complaint on their own behalf, and Dioselina Torres Crespo, Hermes Enrique Torres Solis and Vicencio Chaparro Izquierdo, acting on behalf of their respective deceased fathers, Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. The authors are all members of the Arhuaco community, a Colombian indigenous group, residing in Valledupar, Department of

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Praffullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mrs. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mrs. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Tũrk and Mr. Maxwell Yalden.

[**] In accordance with rule 85 of the rules of procedure, one member of the Committee, Mrs. Pilar Gaitan de Pombo, did not take part in the adoption of the Views.

Cesar, Colombia. It is submitted that they are victims of violations by Colombia of article 2, paragraph 3, article 6, paragraph 1, and articles 7, 9, 14, and 27 of the International Covenant on Civil and Political Rights. They are represented by a lawyer, Mr. Federico Andreu Guzmán.

Facts as submitted by the authors

2.1 On 28 November 1990, at about 1 p.m., Luís Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres boarded a bus in Valledupar for Bogotá, where they were scheduled to attend various meetings with government officials. The same day, at about 11 p.m., José Vicente Villafañe and his brother, Amado Villafañe, were arrested by soldiers from the No. 2 Artillery Battalion "La Popa" stationed in Valledupar. Lieutenant-Colonel Luís Fernando Duque Izquierdo, Commander of the Battalion, had issued a warrant to search the Villafañe brothers' houses, ordering that the search be carried out by Lieutenant Pedro Fernández Ocampo and four soldiers. The search warrant had been authorized on the basis of military intelligence to the effect that the two men were members of a support unit for the Guerrilla Group ELN ("Ejército de Liberación Nacional"), and that they were storing arms and material reserved exclusively for the use of the armed forces. The brothers were released on 4 December 1990, after considerable pressure had been brought to bear by the Arhuaco community.

2.2 Manuel de la Rosa Pertuz Pertuz was also arrested on 28 November 1990, when he left his house to help the Villafañe brothers; he was taken to the "La Popa" barracks, where he was allegedly ill-treated, blindfolded and interrogated by military officers. He was released on 29 November at about 7.15 p.m. Amarilys Herrera Araujo, the common-law wife of Amado Villafañe Chaparro, was also arrested on the night of 28 November 1990, taken to "La Popa" and interrogated. She was released at about 1 a.m. on 29 November 1990. In the last two cases, there was no arrest warrant, but both were deprived of the possibility of obtaining legal assistance.

2.3 It soon transpired that the Arhuaco leaders never reached their destination in Bogotá. On 12 December 1990, a delegation of the Arhuacos went to Curumani to verify the information they had received regarding the abduction of their leaders. It appeared that on 28 November 1990, the driver of the bus (on which the Arhuaco leaders had travelled) had reported to the police in Curumani that, at about 4 p.m., after stopping at a restaurant in Curumani, four armed men had forced three indigenous passengers to board a car; the police, however, had not followed up on the complaint.

2.4 On 13 December 1990, in the municipality of Bosconia, the Arhuaco delegation was informed that, on 2 December 1990, three corpses had been recovered in the vicinity of Bosconia; one in Bosconia itself, a second in the municipality of El Paso, and a third in Loma Linda near the river Arguari. No attempt had been made to identify the bodies, but the clothes and other characteristics listed on the death certificates indicated that the bodies were those of Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. The death certificates further revealed that the three bodies showed traces of torture. The examining magistrate of Valledupar ordered the exhumation of the bodies. The first two bodies were exhumed on 14 December 1990, the third on 15 December. Members of the Arhuaco community called to identify the bodies confirmed that they were those of Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. The necropsy revealed that they had been tortured and then shot in the head.

2.5 Still on 14 December 1990, the Arhuaco community arranged a meeting with government officials and the media in Valledupar. At this meeting, José Vicente Villafañe testified that when he and his brother were being held by the Battalion "La Popa", they were subjected to psychological and physical torture and interrogated about the abduction of a landowner, one Jorge Eduardo Mattos, by a guerrila group. José Vicente Villafañe identified the commander of "La Popa", Lieutenant-Colonel Luis Fernando Duque Izquierdo and the chief of the battalion Intelligence Unit, Lieutenant Pedro Antonio Fernández Ocampo, as those responsible for his and his brother's ill-treatment. He further testified that, during interrogation and torture, they (the officers) claimed that "three other persons had been detained who had already confessed", and threatened him that "if he did not confess they would kill other Indians". Furthermore, on one day he was interrogated by the brother of Jorge Eduardo Mattos, Eduardo Enrique Mattos, who first offered him money in exchange for information on his brother's whereabouts, and then threatened that if he did not confess within 15 days they would kill more individuals of Indian origin. According to José Vicente Villafañe, it was clear from the fact that his arrest and the disappearance of the Arhuaco leaders took place on the same day, as well as from the threats he received, that Lieutenant Fernández Ocampo and Lieutenant-Colonel Duque Izquierdo were responsible for the murders of the three Arhuaco leaders and that Eduardo Enrique Mattos had paid them to do so.

2.6 The Arhuaco community further accused the Director of the Office of Indigenous Affairs in Valledupar, Luis Alberto Uribe, of being an accessory to the crime, as he had accompanied the Arhuaco leaders to the bus station and was one of the very few who knew of the purpose and destination of the journey; furthermore, he had allegedly obstructed the community's efforts to obtain the immediate release of the Villafañe brothers.

2.7 As to the exhaustion of domestic remedies, it transpires that preliminary investigations in the case were first carried out by the examining magistrate of Court No. 7 of Valledupar (Juzgado 7° de Instrucción Criminal Ambulante de Valledupar); on 23 January 1991, the case was referred to the examining magistrate of Court No. 93 in Bogotá (Juzgado 93° de Instrucción Criminal Ambulante de Bogotá), and on 14 March 1991 to Court No. 65 in Bogotá. On 30 May 1991, the Commander of the Second Brigade of Barranquilla, in his capacity as judge on the military tribunal of first instance, requested the examining magistrate of Court No. 65 to discontinue the proceedings in respect of Lieutenant-Colonel Duque Izquierdo and Lieutenant Fernández Ocampo, as Military Court No. 15 (Juzgado 15° de Instrucción Penal Militar) had begun its own investigation in the case; furthermore, since the alleged offences had been committed in the course of duty by the officers concerned, i.e. in their military capacity, they fell exclusively within military jurisdiction.

2.8 The examining magistrate of Court No. 65 refused and asked the Disciplinary Tribunal to rule on the matter; on 23 July 1991, the Disciplinary Tribunal decided that the competence to try Lieutenant-Colonel Duque Izquierdo and Lieutenant Fernández Ocampo was indeed with the military courts, i.e. the Second Brigade of Barranquilla. There was one dissenting vote, as one magistrate considered that the conduct of the two officers was not directly related to their military status. It is stated that military criminal proceedings against the two accused were discontinued on 30 April 1992, with respect to the allegation made by the Villafañe brothers, and on 5 May 1992 with respect to the disappearance and subsequent murders of the three indigenous leaders. These decisions were confirmed by the High Military Court (Tribunal Superior Militar) on 8 March 1993 and in July 1993.

2.9 Meanwhile, the part of the criminal proceedings in which charges were brought against Eduardo Enrique Mattos and Luis Alberto Uribe had been referred to Court No. 93; on 23 October 1991, the Court acquitted both accused and ordered all criminal proceedings against them to be discontinued. Counsel then appealed to the High Court in Valledupar, which confirmed the decision of 23 October 1991; it found that the evidence against Luis Alberto Uribe was insufficient to prove any involvement in the murders and also took into consideration the fact that Eduardo Enrique Mattos had died in the meantime.

2.10 The Human Rights Division of the Attorney-General's Office (Procuraduría Delegada para la Defensa de los Derechos Humanos) initiated independent disciplinary proceedings in the case. In a decision dated 27 April 1992, it found Lieutenant-Colonel Duque Izquierdo and Lieutenant Fernández Ocampo guilty of torturing José Vicente and Amado Villafañe and of having participated in the triple murder of Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. It ordered their summary dismissal from the army. The Director of the Office of Indigenous Affairs was, however, acquitted. Counsel submits that the findings of the Human Rights Division of the Attorney-General's Office have been consistently ignored by the Colombian authorities, as evidenced by Major-General Hernando Camilo Zuñiga Chaparro on 3 November 1994, in his reply to a request for information made by the Colombia section of the Andean Commission of Jurists. In this reply, he stated that the two officers had retired from the army, in December 1991 and September 1992, at their own request.

Complaint

3.1 It is submitted that the above situation reveals that the members of the Arhuaco community, Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, as well as the two Villafañe brothers, have been victims of violations by Colombia of article 2, paragraph 3, article 6, paragraph 1, and articles 7, 9, 14 and 27 of the Covenant.

3.2 Counsel claims that the disappearance, on 28 November 1990, and subsequent execution of the three indigenous leaders, by members of the armed forces, constitutes a violation of article 6 of the Covenant.

3.3 Counsel claims that the abduction and subsequent murder of the three indigenous leaders, without so much as a warrant for their arrest, is a violation of article 9 of the Covenant.

3.4 The Villafañe brothers claim that the ill-treatment they were subjected to at the hands of the armed forces while detained at the No. 2 Battalion "La Popa", which included blindfolding and dunking in a canal, etc., constitutes a violation of article 7.

3.5 Furthermore, the interrogation of the Villafañe brothers, members of the indigenous community, by members of the armed forces in total disregard of the rules of due process, by denying them the assistance of a lawyer, and the execution of the three indigenous persons in blatant violation of the Colombian legal system, which expressly prohibits the imposition of the death penalty, is a violation of article 14 of the Covenant.

3.6 Finally, the Villafañe brothers claim that the arbitrary detention and torture inflicted on two members of the Arhuaco indigenous community and the disappearance and execution of three other members of this community, two of whom were spiritual leaders of the community, constitute a violation of the cultural and spiritual rights of the Arhuaco community within the meaning of article 27 of the Covenant.

State party's information and observations

4.1 By submission of 22 March 1995, the State party submits that its authorities have been doing, and are doing, everything possible to bring to justice those responsible for the disappearance and murder of Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. The State party contends that domestic remedies have not been exhausted in the case.

4.2 The State party summarizes the state of the disciplinary proceedings in the case as follows:

> Disciplinary proceedings were first instituted by the Human Rights Division of the Attorney-General's Office for the torture to which the Villafañe brothers were subjected and subsequently for the abduction and triple murder of Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres. The result of this investigation was a recommendation that the two officers should be dismissed and that Alberto Uribe Oñate, Director of the Office of Indigenous Affairs in Valledupar, should be acquitted. The decision was appealed, but, on 27 October 1992, the ruling of the lower court was upheld.
>
> Criminal proceedings were initiated by Court No. 65 in Bogotá and by Military Court No. 15; the conflict of jurisdiction was settled in favour of the military's jurisdiction. The State party notes that a special agent was named from the Attorney-General's Office to appear in the proceedings. On 5 May 1993, the military court held that there was insufficient evidence to indict Lieutenant-Colonel Luis Fernando Duque Izquierdo and Lieutenant Pedro Fernández Ocampo (by then Captain) and that proceedings should be discontinued. This decision was upheld by the High Military Court.
>
> Meanwhile, on 23 October 1991, Criminal Court No. 93 had ordered that the case against Alberto Uribe Oñate and Eduardo Enrique Mattos be shelved; it also decided that the case should be sent back to the Valledupar Judicial Police for further investigations. In accordance with article 324 of the Code of Penal Procedure, preliminary investigations must continue until such time as there is sufficient evidence either to indict or to clear those allegedly responsible for a crime.

4.3 In his reply, counsel submits that the State party's allegation that domestic remedies exist is a fallacy, since, under the Colombian Military Code, there are no provisions enabling the victims of human rights violations or their families to institute criminal indemnity proceedings before a military court.

4.4 In a further submission of 8 December 1995, the State party observes that, when ruling on the appeal against the sentence of 26 August 1993 handed down by the Administrative Tribunal in Valledupar in respect of the participation of members of the military in the disappearance and subsequent murder of the three indigenous leaders, the Third Section of the Administrative Chamber of the State Council upheld the decision of the lower court that there was no evidence that they had taken part in the murder of the three leaders.

Committee's decision on admissibility

5.1 At its fifty-sixth session, the Committee examined the admissibility of the communication and took note of the State party's request that the communication should be declared inadmissible. With regard to the exhaustion of available domestic remedies, the Committee noted that the victims' disappearance was reported immediately to the police in Curumani by the bus driver, that the complaint filed with the Human Rights Division of the Attorney-General's Office clearly indicated which army officers were held responsible for the violations and should be punished and that further proceedings were instituted in Criminal Court No. 93. Notwithstanding this material evidence, a military investigation was conducted during which the two officers were cleared and not brought to trial. The Committee considered that there were doubts about the effectiveness of remedies available to the authors in the light of the decision of Military Court No. 15. In these circumstances, it must be concluded that the authors diligently, but unsuccessfully, filed applications for remedies aimed at the criminal prosecution of the two military officers held to be responsible for the disappearance of the three Arhuaco leaders and the torture of the Villafañe brothers. More than five years after the occurrence of the events dealt with in the present communication, those held responsible for the death of the three Arhuaco leaders have not been indicted let alone tried. The Committee concluded that the authors had fulfilled the requirements of article 5, subparagraph 2 (b), of the Optional Protocol.

5.2 It had to be decided whether the disciplinary and administrative proceedings could be regarded as effective domestic remedies within the meaning of article 5, subparagraph 2 (b). The Committee recalled that domestic remedies must not only be available, but also effective, and that the term "domestic remedies" must be understood as referring primarily to judicial remedies. The Committee considered that the effectiveness of a remedy also depended on the nature of the alleged violation. In other words, if the alleged offence is particularly serious, as in the case of violations of basic human rights, in particular the right to life, purely administrative and disciplinary remedies cannot be considered adequate and effective. This conclusion applies in particular in situations where, as in the present case, the victims or their families may not be party to or even intervene in the proceedings before military jurisdictions, thereby precluding any possibility of obtaining redress before these jurisdictions.

5.3 With regard to the complaint under article 27, the Committee considered that the authors had failed to substantiate how the actions attributed to the military and to the authorities of the State party violated the right of the Arhuaco community to enjoy its own culture or to practise its own religion. Accordingly, that part of the complaint was declared inadmissible.

5.4 In the light of paragraphs 5.1 and 5.2 above, the Committee considered that the authors had met the requirements of article 5, subparagraph 2 (b), of the Optional Protocol. Their complaints under article 6, paragraph 1, and articles 7, 9 and 14 of the Covenant were sufficiently substantiated and could be considered on their merits.

State party's information and observations on the merits and counsel's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 14 November 1996, the State party observes that difficulties of an internal nature arose in obtaining the information needed to reply to the Committee in the case at hand. It considers that the case should be declared inadmissible because of failure to exhaust available domestic remedies and indicates that it would be willing to reopen the case if new evidence warranting such a course came to light.

6.2 As far as the criminal proceedings are concerned, the State party submits that the first proceedings instituted against Mr. Eduardo Enrique Mattos and Mr. Alberto Uribe after the murders of the indigenous leaders were unsuccessful and it was not possible to identify those responsible. On 18 January 1995, the investigation was assigned to the Seventeenth Public Prosecutor's Office attached to the Valledupar District Court and, under article 326 of the Code of Criminal Procedure, it suspended the proceedings, as no new evidence had come to light since 30 June 1992. On 23 March 1995, the Seventeenth Public Prosecutor reopened the proceedings for the purpose of considering the possibility of securing the cooperation of an alleged witness to the events. On 9 May 1995, the witness was interrogated by a psychologist on the staff of the Technical Investigation Unit in Bucaramanga. On 1 November 1995, the psychologist issued a report on the witness's credibility. In view of the contradictions between the witness's statements to the prosecutor and the psychologist, the Public Prosecutor decided that the witness lacked credibility. On 2 September 1996, he ordered the case temporarily suspended, also pursuant to article 326 of the Code of Criminal Procedure.

6.3 In connection with the disciplinary proceedings and the dismissals of Lieutenant-Colonel Luis Fernando Duque Izquierdo and Lieutenant Fernández Ocampo, they went into retirement at their own request, on the basis of decisions of December 1991 and September 1992, as upheld by a decision of 7 November 1996.

7.1 In his comments on the criminal proceedings, counsel states that the proceedings have taken place in two spheres: ordinary jurisdiction and military jurisdiction. The ordinary criminal proceedings have been conducted in a tortuous manner: on 30 June 1992, the investigation was halted by decision of the Valledupar High Court; on 23 March 1995, the investigation was reopened, by decision of the Attorney-General of the nation; on 2 September 1995, the investigation was temporarily suspended at the request of the Seventeenth Public Prosecutor in Valledupar. In six years of investigation, both sets of proceedings led to the closure of the case.

7.2 Counsel states that the criminal proceedings are in contrast with the clear and forceful action taken by the Human Rights Division of the Attorney-General's Office. In Decision No. 006 of 27 April 1992, the Human Rights Division considered the following facts to have been substantiated:

> That the indigenous leaders of the Arhuaco community, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, were detained on 28 November 1990 by Colombian army units near Curumani, Department of César.
>
> That, also on 28 November, at about 10 p.m., the brothers José Vicente and Amado Villafañe Chaparro, members of the indigenous community, and Manuel de la Rosa Pertuz were detained in Valledupar, Department of César, by military units headed by Lieutenant Pedro Antonio Fernández Ocampo in an operation ordered by Military Court No. 15, and later taken to the No. 2 Artillery Battalion "La Popa" barracks, where they were tortured (sheets 12 and 13). That, in the view of the Human Rights Division, "there is no doubt that Lieutenant-Colonel Duque Izquierdo played an active role in the events under investigation" (sheet 13).

That José Vicente Villafañe Chaparro was transported, against his will and after being tortured, in a helicopter to a place in the mountains by military personnel (sheets 14 and 17), where he was tortured by units of No. 2 Artillery Battalion "La Popa", as part of an investigation conducted by military personnel attached to Military Court No. 15 to determine the whereabouts of Mr. José Eduardo Mattos, who had been abducted by an insurgent group.

That, while in detention in the military barracks and in the presence of military personnel, the Villafañe Chaparro brothers were interrogated and tortured by Eduardo Enrique Mattos, a civilian and brother of the abducted person. Eduardo Enrique Mattos threatened the Villafañe brothers that he would kill indigenous people if they did not reveal his brother's whereabouts and said, "to prove it, they were already holding three of them" (sheet 31).

That the military operations that led to the detention of indigenous leaders Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, on the one hand, and the Villafañe Chaparros brothers and Manuel de la Rosa Pertuz, according to the evidence gathered by the Human Rights Division, were coordinated from Valledupar and almost certainly from No. 2 Artillery Battalion "La Popa" (sheet 19).

7.3 In the above-mentioned decision of 1992, the Human Rights Division considered, in the following terms, that the two officers' participation in the events had been established:

> "Luis Fernando Duque Izquierdo and Pedro Antonio Fernández Ocampo took part in both the physical and psychological torture inflicted on José Vicente and Amado Villafañe Chaparro, members of the Arhuaco indigenous community, and on a civilian, Manuel de la Rosa Pertuz Pertuz, and also the abduction and subsequent killing of Angel María Torres, Luis Napoleón Torres and Antonio Hugues Chaparro" (sheet 30).

On the basis of the evidence gathered by the Human Rights Division, counsel rejects the Colombian Government's argument justifying the delays and standstill in the investigations.

7.4 Counsel submits that the disciplinary procedure which led to the ordering of the two sanctions was not judicial, but administrative in nature - a "disciplinary investigation", which is aimed at "preserving the orderly conduct of the public service and protecting the principle of legality infringed by State agents who commit minor administrative offences". By virtue of his disciplinary powers, the Attorney-General of the nation may, once the disciplinary procedure has been completed, order administrative sanctions if necessary. Private individuals cannot be parties to a disciplinary investigation nor can they institute criminal indemnity proceedings. Neither can persons injured as a result of an administrative offence use the disciplinary procedure to obtain appropriate compensation for the injury suffered. The purpose of disciplinary proceedings is not to provide compensation for the injury caused by the behaviour of the State agent or to restore the infringed right. In this connection, counsel refers to the previous decisions by the Committee.[48]

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[48] Communication No. 563/1993 (Nydia Bautista de Arellana v. Colombia), Views adopted on 27 October 1995, para. 8.2.

7.5 Counsel reiterates that domestic remedies were exhausted when the relevant criminal complaint was lodged with the competent ordinary court and also when criminal indemnity proceedings were instituted. The proceedings were closed. There has been unjustified delay in the proceedings.

Examination of the merits:

8.1 The Human Rights Committee has examined the present communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 In its submission of 14 November 1996, the State party indicates that Lieutenant Fernández Ocampo and Lieutenant-Colonel Izquierdo retired from the army at their own request, on the basis of decisions 7177 of 7 September 1992 and 9628 of 26 December 1991, respectively. Moreover, the recommendation by the Human Rights Division of the Attorney-General's Office that these two persons should be dismissed was not implemented, since they retired from the army at their own request. The State party also reiterates its desire to guarantee fully the exercise of human rights and fundamental freedoms. These observations would appear to indicate that, in the State party's opinion, the above-mentioned decision constitutes an effective remedy for the families of the deceased indigenous leaders and for the Villafañe brothers. The Committee does not share this view: purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, especially when violation of the right to life is alleged, as it indicated in its decision on admissibility.

8.3 In respect of the alleged violation of article 6, paragraph 1, the Committee observes that Decision No. 006/1992 of the Human Rights Division of 27 April 1992 clearly established the responsibility of State agents for the disappearance and subsequent death of the three indigenous leaders. The Committee accordingly concludes that, in these circumstances, the State party is directly responsible for the disappearance and subsequent murder of Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, in violation of article 6 of the Covenant.

8.4 As to the claim under article 7 in respect of the three indigenous leaders, the Committee has noted the results of the autopsies, and also the death certificates, which revealed that the indigenous leaders had been tortured prior to being shot in the head. Given the circumstances of the abduction of Mr. Luis Napoleón Torres Crespo, Mr. Angel María Torres Arroyo and Mr. Antonio Hugues Chaparro Torres, together with the results of the autopsies and the lack of information from the State party on that point, the Committee concludes that Mr. Luis Napoleón Torres Crespo, Mr. Angel María Torres Arroyo and Mr. Antonio Hugues Chaparro Torres were tortured after their disappearance, in violation of article 7.

8.5 As to the Villafañe brothers' claim under article 7, the Committee has noted the conclusions contained in the decision of 27 April 1992, to the effect that the brothers were subjected to ill-treatment by soldiers from the No. 2 Artillery Battalion "La Popa", including being blindfolded and dunked in a canal. The Committee concludes that José Vicente and Amado Villafañe were tortured, in violation of article 7 of the Covenant.

8.6 Counsel has alleged a violation of article 9 in respect of the three murdered indigenous leaders. The above-mentioned decision of the Human Rights Division concluded that the indigenous leaders' abduction and subsequent detention were illegal (see paras. 7.2 and 7.3 above), as no warrant for their arrest had been issued and no formal charges had been brought against them. The

Committee concludes that the authors' detention was both unlawful and arbitrary, violating article 9 of the Covenant.

8.7 Counsel has claimed a violation of article 14 of the Covenant in connection with the interrogation of the Villafañe brothers by members of the armed forces and by a civilian with military authorization without the presence of a lawyer and with total disregard for the rules of due process. As no charges were brought against the Villafañe brothers, the Committee considers it appropriate to speak of arbitrary detention rather than unfair trial or unfair proceedings within the meaning of article 14. The Committee accordingly concludes that José Vicente and Amado Villafañe were arbitrarily detained, in violation of article 9 of the Covenant.

8.8 Lastly, the Committee has repeatedly held that the Covenant does not provide that private individuals have a right to demand that the State criminally prosecute another person.[49] The Committee nevertheless considers that the State party has a duty to thoroughly investigate alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified.

9. The Human Rights Committee, acting in conformity with article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by the State party of articles 7 and 9 of the Covenant in the case of the Villafañe brothers and of articles 6, 7 and 9 of the Covenant in the case of the three leaders Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres.

10. Under article 2, paragraph 3, of the Covenant, the State party has an obligation to ensure that Mr. José Vicente and Mr. Amado Villafañe and the families of the murdered indigenous leaders shall have an effective remedy, which include a compensation for loss and injury. The Committee takes note of the content of Decision No. 029/1992, adopted by the Human Rights Division on 29 September 1992, upholding Decision No. 006/1192 of 27 April, but urges the State party to expedite the criminal proceedings for the prompt prosecution and trial of the persons responsible for the abduction, torture and death of Mr. Luis Napoleón Torres Crespo, Mr. Angel María Torres Arroyo and Mr. Antonio Hugues Chaparro Torres and of the persons responsible for the abduction and torture of the Villafañe brothers. The State party also has an obligation to ensure that similar events do not occur in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide effective remedies in cases where a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

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[49] See the Views adopted in Communication No. 213/1986 (H. C. M. A. v. the Netherlands), adopted 30 March 1989, para. 11.6; Communication No. 275/1988, (S. E. v. Argentina), adopted 26 March 1990, para. 5.5; Communication Nos. 343-345/1988 (R. A., V. N. et al. v. Argentina), adopted 26 March 1990, para. 5.5.

R. Communication No. 639/1995; Walker Lawson Richards and Trevor Walker v. Jamaica (Views adopted on 28 July 1997, sixtieth session)[*]

Submitted by:	Trevor Walker and Lawson Richards (represented by Ms. Veronica Byrne of Mishcon de Reya)
Victim:	The authors
State party:	Jamaica
Date of communication:	24 and 27 February 1995 (initial submission)
Date of decision on admissibility and of adoption of Views:	28 July 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 1997,

Having concluded its consideration of Communication No. 639/1995 submitted to the Human Rights Committee by Messrs. Trevor Walker and Lawson Richards, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Lawson Richards and Trevor Walker, two Jamaican nationals who, at the time of submission, were awaiting execution at St. Catherine's District Prison, Jamaica. They claim to be victims of violations by Jamaica of articles 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. They are represented by the London law firm of Mishcon de Reya.

Facts as presented by the authors

2.1 Mr. Walker was arrested on 23 June 1980 and Mr. Richards on 26 June 1980. Both authors were convicted on 17 May 1982 of the murder of one Samuel Anderson and were sentenced to death.[50] They filed an application for leave to appeal against conviction and sentence to the Court of Appeal of Jamaica on 31 May 1982. At the hearing, counsel for Lawson Richards abandoned his original grounds of appeal, but sought and was granted leave to argue supplemental grounds. Counsel for Trevor Walker abandoned his original grounds of appeal and informed the Court that there was nothing he could argue. On 24 October 1984, the Court of Appeal dismissed the authors' appeal. The Judicial Committee of the Privy Council heard and dismissed the part of the authors' appeal relating to their conviction on 3 December 1992, but ordered that the authors be granted special leave to appeal their sentences. On 2 November 1993, the Privy Council dismissed the appeal because it was being asked to decide the constitutional question of delay as a court of first instance, rather than as a court of appeal.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Tûrk and Mr. Maxwell Yalden.

[50] In June 1995 the authors' death sentence had been commuted to life imprisonment.

2.2 At the trial, the case for the prosecution was that, on 20 June 1980, Lawson Richards and Trevor Walker robbed and murdered Samuel Anderson. The prosecution's primary evidence was the testimony of one eyewitness to the robbery. The eyewitness testified at trial that he had been helping the deceased sell meat when he noticed the authors approach them in a suspicious manner. He then saw the two men rob the deceased at gunpoint. He was unable to see who fired the fatal shot, however, because he had been trying to hide from the two men. The eyewitness further testified that when he attempted to help the deceased, one of the men fired a shot at him.

2.3 The sole eyewitness attended identification parades on 22 July 1980.[51] The witness identified Mr. Walker at the parade. Mr. Richards stood on parade, but was not identified by the witness. The witness later identified him in the dock at the trial itself.

2.4 The prosecution further relied on caution statements allegedly made to the police by the authors in which they implicated each other. In a voir dire, the authors denied that they had made their statements voluntarily and alleged that they were obtained from them by physical force and threats of physical force. The police officers who took the statements testified, at trial, that the statements were given voluntarily, denying that the authors were beaten, threatened or induced into giving their statements. A Justice of the Peace also testified that he witnessed the taking of both statements and that the authors had given the statements voluntarily and had not shown any signs of having been beaten. Additionally, the prosecution relied on medical evidence indicating that the cause of death of the deceased had been shock and haemorrhage caused by the bullet.

2.5 In an unsworn statement from the dock, Mr. Richards stated that he had been in the area at the time of the shooting and that he had run away when he heard an explosion. In addition, he claims that one Delroy Johnson[52] had been beaten by the police until he had made a statement falsely accusing Richards of the murder.

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[51] There is some discrepancy as to when the identification parade took place. The eyewitness at trial and the deposition of the officer who conducted the parade both stated that the parade took place on 2 July 1980 (the deposition was allowed in as evidence because the officer was out of the country during the trial). The arresting officers, on the other hand, testified that it took place on 22 July 1980.

[52] Delroy Johnson is also referred to as Delroy Jackson and Delroy Campbell in various parts of the proceedings.

2.6 Mr. Walker made an unsworn statement from the dock saying that he had been with someone in the area at the time of the shooting and that they had both run away when they heard an explosion.

Complaint

3.1 Counsel argues that the prosecution's case was based on the identification evidence of an eyewitness who was unreliable and contradictory. It is asserted that his identification was based on fleeting, obstructed sightings of the authors, in very bad lighting conditions and under extreme fear. In addition, it is contended that the eyewitness failed to identify Mr. Richards at the identification parade held one month after the murder and at the committal proceedings at the Gun Court, yet purported to identify him in the dock, at trial, held nearly two years later.

3.2 Counsel contends that the unsatisfactory aspects of the trial, in particular, the misdirections by the judge to the jury as to the voluntariness of the authors' caution statements, the failure to give proper directions regarding identification evidence generally and, in the case of Mr. Richards, allowing the dock identification, amount to a violation of articles 14, paragraph 1 and subparagraph 3 (c). Failure to argue these defects before the Court of Appeal and the delay at the Court of Appeal are said to constitute violations of article 14. It is also asserted that the Court of Appeal erred in accepting the trial court's rulings and denying the appeal.

3.3 Counsel further contends that the imposition of the death sentence upon the conclusion of a trial in which the provisions of the Covenant had been breached, and where no further appeal is available, constitutes a violation of article 6, paragraph 2, of the Covenant.

3.4 In addition, counsel submits that the authors were subjected to a delay of nearly two years between arrest and trial and a further delay of nearly two and a half years for the Court of Appeal's decision dismissing their appeal. Additionally, there was a delay of about five years before the Jamaican Council of Human Rights was informed by the Supreme Court Office of the availability of the authors' trial transcript and Court of Appeal judgement, documents necessary in the determination of the possibility of appeal to the Privy Council. Counsel argues that these delays in the criminal proceedings against the authors constitute a violation of article 9, paragraphs 3 and 4, of the Covenant.

3.5 It is further asserted that the uncertainty caused by having been confined to death row since May 1982 constitutes cruel, inhuman or degrading treatment or punishment, in violation of article 7 of the Covenant. Reference is made to the Pratt and Morgan judgement of the Privy Council.[53]

3.6 In addition, counsel contends that the appalling conditions suffered by detainees in the death row section of St. Catherine's Prison constitute a further violation of article 7. Reference is made to reports by Human Rights Watch and Amnesty International.

3.7 It is further submitted that Mr. Walker was beaten on 29 May 1990, for which he required five stitches for one injury, and subjected to other ill-treatment by warders on death row. On 4 May 1993, Mr. Richard's radio was destroyed by warders on death row in a deliberate attempt to intimidate and humiliate him. Counsel contends that the beatings and mistreatment received by the authors at the hands of the police during questioning and prison authorities after conviction amount to a violation of article 10, paragraph 1.

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[53] Earl Pratt and Ivan Morgan v. Attorney-General of Jamaica, P.C. Appeal No. 10 of 1993, judgement delivered on 2 November 1993.

State party's comments on admissibility and merits

4.1 In a submission dated 24 October 1995, the State party does not challenge the admissibility of the communication and in order to expedite examination of the complaint offers comments on the merits. On the alleged violation of article 7, the State party argues that twelve years on death row do not constitute cruel and inhuman treatment per se. It further argues that the five year rule in Pratt and Morgan is not directly applicable but rather that each case must be examined on its merits, in accordance with the legal principles applicable to it. It informs the Committee that the authors' death sentences will be commuted.

4.2 Concerning the alleged breach of article 9, paragraphs 3 and 4 and article 14, subparagraph 3 (c), because of the delay of nearly two years between the authors' arrest and trial, the nearly two and a half years between sentence and dismissal of their appeal by the Court of Appeal, and the lapse of five years before the Court of Appeal issued a written judgement, the State party rejects that these delays constitute excessive delay, particularly in as much as the two years between arrest and trial are concerned as during that period a preliminary inquiry was held. It also rejects that the two and a half years is an excessive delay to hear an appeal. It does concede that five years to produce a written judgement would be excessive if the delay was attributable to the State party, but argues that the authors did not make diligent efforts to obtain the documents and therefore rejects responsibility for the delay.

4.3 With regard to the alleged ill-treatment of the authors in pre-trial detention and later in prison, the State party contends that it has found no evidence that any ill-treatment occurred and categorically denies that the incidents referred to took place at all. With respect to Mr. Walker's complaint of ill-treatment in prison, the State party contends that this occurred during prison riots of May 1990, and promises to investigate this allegation. As of 30 June 1997, no information had been received from the State party in this respect.

4.4 Regarding the alleged violation of article 14, paragraph 1, the State party argues that the way in which the judge gave directions to the jury on how to consider identification parade evidence and on how to interpret common design in murder cases, is a matter which was properly left to the appellate court.

5.1 On 25 May 1996, counsel informed the Committee that the authors' death sentences were commuted following the ruling in Pratt and Morgan and that it follows that the first complaint under article 7, delay in execution of sentence is abandoned, as is the request for interim measures of protection under rule 86. However, she reiterates, that prolonged detention on death row, over 13 years for both authors under conditions which were no different to those suffered by Pratt and Morgan, constitutes cruel and inhuman treatment in violation of article 7.

5.2 Counsel contends that the decision by the Governor-General to substitute the authors' death sentence with life imprisonment raises issues under articles 9 and 14 of the Covenant. Counsel contends that the procedure by which the authors remain incarcerated is unclear and unfair and raises the following contentions:

- "They are not imprisoned in accordance with a procedure established by law as required by article 9(1) in that no court made a decision to deprive them of their liberty (the sentence of the court was death). Therefore they are incarcerated in accordance with an unknown, imprecise and secret administrative procedure.

- "They have no entitlement to take proceedings to challenge their incarceration - either the very fact of incarceration, or, more importantly, the length of incarceration - as required by article 9(4).

- "There is no procedure for reviewing their sentence (in particular, its length) as required by article 14(5).

- "The long years spent by the Applicants on death row may well not have been taken into account in determining how long they should serve as a term of imprisonment. If so, they face double punishment.

- "If a 'tariff' (the period of imprisonment the State party considers they should serve before becoming eligible for release on parole) has been set, they do not know what that period is, have no information about the material forming the basis for setting any such tariff, have had no opportunity to make representations on the tariff and have not been able to challenge a decision upon the tariff."

5.3 These points have not been answered by the State party, but the Committee is cognizant of the Jamaican legislation which governs the authors' case.

5.4 With regard to the ill-treatment suffered by Mr. Richards, counsel notes that the State party has failed to address the issue. In respect of Mr. Walker, counsel notes that State party offered to investigate but points out that the events occurred over six years ago and that Mr. Walker's counsel wrote to the Parliamentary Ombudsman in October 1992, raising the same issue, and that the State party had not investigated the matter by October 1995, when the present communication was first transmitted to it.

5.5 On the question of delay in court proceedings, including issuing a written judgement and a copy of the trial transcript, counsel reiterates that the delays were attributable to the State party only and notes that the Jamaican Council for Human Rights wrote to the Registrar of the Court of Appeal on eight occasions between 23 June 1986 and 17 March 1989 (23 June 1986, 10 June and 8 December 1987, 23 March, 14 April, 14 and 16 November 1988 and 17 March 1989). She notes that the authors have made diligent efforts to obtain these documents but were unable to obtain them.

Admissibility consideration and examination of merits

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that, with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council on 2 November 1993, the authors have exhausted available domestic remedies. In this context, it notes that the State party has not raised any objections to the admissibility of the complaint and has forwarded comments on the merits. This enables the Committee to consider both the admissibility and the merits of the present case, pursuant to rule 94, paragraph 1, of the Committee's rules of procedure. Pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 As regards the authors' allegations of irregularities in the Court proceedings, in particular improper instructions from the judge to the jury on the evaluation of the identification evidence, the interpretation of common design in capital cases, the Committee recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in any particular case; similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The authors' allegations do not show that the judge's instructions suffered from such defects. In this respect, therefore, the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.4 Insofar as the authors claim that their prolonged detention on death row amounted to a violation of article 7 of the Covenant, the Committee reiterates its prior jurisprudence that a prolonged detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant,[54] in the absence of further compelling circumstances. As no such further compelling circumstances have been adduced, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 So far as concerns the claims referred to in paragraph 5.2 above, the Committee notes that the conviction on 17 May 1982 led to mandatory death sentences against the authors; but also that these have been commuted by the Governor-General following the decision of the Privy Council in Pratt and Morgan. Although that commutation took place in June 1995, it was carried out under the prerogative of mercy and not under the detailed provisions in the Offences Against the Person (Amendment) Act 1992 for reclassification of convictions for murder, including, in cases classified as non-capital murder, a procedure for fixing a tariff.

6.6 Counsel alleges a violation of articles 9 and 14 of the Covenant, as she purports that the authors' death sentences were commuted to life imprisonment by virtue of an "unknown imprecise and secret administrative procedure". The material before the Committee shows that the authors' death sentences were commuted to life imprisonment by the Governor-General, who followed the ratio decidendi in the Pratt and Morgan judgement delivered on 2 November 1993 by the Privy Council. The Committee considers this claim an abuse of the right of submission, under article 3 of the Optional Protocol.

6.7 With regard to the authors' allegations that they were ill-treated and forced to confess, the Committee notes that this issue was the subject of a trial within a trial, to determine whether the authors' statements were admissible in evidence. In this connection the Committee refers to its prior jurisprudence and reiterates that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case; it notes that the Jamaican courts examined the authors' allegations and found that the statements had not been procured under duress. In the absence of clear evidence of bias or misconduct by the judge, the Committee cannot reevaluate the facts and evidence underlying the judge's findings. Accordingly this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

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[54] See Committee's Views on Communication No. 588/1994 (Errol Johnson v. Jamaica) adopted 22 March 1996.

6.8 In the course of the authors' continued detention under these life sentences, the Committee notes that no issue arises on a period set for tariff, or any reasons for that. If the authors have cause to believe that the State party has failed, in due time, to provide for a system of reviewing their eligibility for release on license, or the licensing system or criteria for adjudication on these issues, it is a matter which should first be raised in the domestic courts, and these circumstances have not yet arisen.

7. In the circumstances of the case the Committee decides that the other claims of the authors' are admissible and proceeds to an examination of the substance of those claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 With regard to the alleged violation of article 10, paragraph 1, of the Covenant for ill-treatment in detention on death row, the Committee notes that in respect of Mr. Walker's complaint that he was beaten in May of 1990, which required five stitches for his injury, the State party admitted that these injuries occurred during the prison riots in May 1990 riots and that it would investigate the matter and inform the Committee. The Committee further notes that 20 months after the communication was brought to the attention of the State party and over seven years after the events, no information has been received to explain the matter. In the circumstances and in the absence of information from the State party, the Committee finds that the treatment received by Mr. Walker on death row constitutes a violation of article 10, paragraph 1, of the Covenant.

8.2 The authors have argued that a delay of nearly two years between arrest and trial and a further delay of 30 months between trial and appeal, was unduly long and constitutes a violation of article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant. Article 9, paragraph 3, entitles an arrested person to trial within a reasonable time or to release. The Committee notes that the arguments forwarded by the State party do not address the question why the authors, if not released on bail, were not brought to trial for nearly two years. The Committee is of the view that in the context of article 9, paragraph 3, and in the absence of any satisfactory explanation for the delay by the State party, a delay of nearly two years during which the authors were in detention, is unreasonable and therefore constitutes a violation of this provision. With respect to the delay in hearing the authors' appeal and bearing in mind that this is a capital case, the Committee notes that a delay of 30 months between the conclusion of the trial and the dismissal of the authors' appeal is incompatible with the provisions of the Covenant, in the absence of any explanation from the State party justifying the delay; the mere affirmation that the delay was not excessive does not suffice. The Committee accordingly concludes that there has been a violation of article 9, paragraph 3 and article 14, subparagraph 3 (c), of the Covenant.

8.3 The authors claim a violation of article 14, subparagraph 3 (c) and paragraph 5 for the delay of almost five years before the Jamaican Council of Human Rights was informed by the Supreme Court Office of the availability of the authors' trial transcript and Court of Appeal judgment. The State party has conceded that if this delay had been totally attributable to the State party, this would constitute a violation of the Covenant, but that in the present case, the authors had made no diligent effort to obtain the relevant documents requested. Counsel has submitted, however, that the Jamaican Council for Human Rights requested such documents on eight occasions between 23 June 1986 and 17 March 1989. The Committee considers that, in these circumstances, the authors have made diligent efforts to obtain the documents and that the delays must be attributed to the State party. Accordingly, the Committee concludes that there has been a violation of article 14, subparagraph 3 (c), of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 10, paragraph 1, in respect of Mr. Walker and article 14, subparagraphs 3 (c), of the Covenant in respect of both authors.

10. In accordance with article 2, subparagraph 3 (a), of the Covenant, the State party is under an obligation to provide Messrs. Walker and Richards with an effective remedy, entailing compensation for the delay in issuing a written judgment and providing the trial transcripts and in Mr. Walker's case for the ill-treatment suffered. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken in connection with the Committee's Views.

S. Communication No. 671/1995; Jouni E. Länsman et al. v. Finland (Views adopted on 30 October 1996, fifty-eighth session)

Submitted by:	Jouni E. Länsman et al. [represented by counsel]
Victims:	The authors
State party:	Finland
Date of communication:	28 August 1995 (initial submission)
Date of decision on admissibility:	14 March 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 1996,

Having concluded its consideration of Communication No. 671/1995 submitted to the Human Rights Committee on behalf of Messrs. Jouni E. Länsman et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication (dated 28 August 1995) are Jouni E. Länsman, Jouni A. Länsman, Eino A. Länsman and Marko Torikka, all members of the Muotkatunturi Herdsmen's Committee. The authors claim to be victims of a violation by Finland of article 27 of the International Covenant on Civil and Political Rights. They are represented by counsel.

Facts as submitted by the authors

2.1 The authors are reindeer breeders of Sami ethnic origin; they challenge the plans of the Finnish Central Forestry Board to approve logging and the construction of roads in an area covering about 3,000 hectares of the area of the Muotkatunturi Herdsmen's Committee. The members of the Muotkatunturi Herdsmen's Committee occupy areas in the North of Finland, covering a total of 255,000 hectares, of which one fifth is suitable for winter herding. The 3,000 hectares are situated within these winter herding lands.

2.2 The authors point out that the question of ownership of the lands traditionally used by the Samis remains unsettled.

2.3 The activities of the Central Forestry Board were initiated in late October 1994, but stopped on 10 November 1994 by an injunction of the Supreme Court of Finland (Korkein oikeus). According to the authors, a representative of the Central Forestry Board has recently stated that the activities will resume before the winter; they express concern that the logging will resume in

October or November 1995, since the injunction issued by the Supreme Court lapsed on 22 June 1995.

2.4 The disputed area is situated close to the Angeli village near the Norwegian border, and to the Muotkatunturi Herdsmen's Committee's slaughterhouse and location for annual roundup of reindeer. The authors affirm that some 40 per cent of the total number of the reindeer owned by the Muotkatunturi Herdsmen's Committee feed on the disputed lands during winter. The authors observe that the area in question consists of old untouched forests, which means that both the ground and the trees are covered with lichen. This is of particular importance due to its suitability as food for young calves and its utility as "emergency food" for elder reindeer during extreme weather conditions. The authors add that female reindeer give birth to their calves in the disputed area during springtime, because the surroundings are quiet and undisturbed.

2.5 The authors note that the economic viability of reindeer herding continues to decline and that Finnish Sami reindeer herdsmen have difficulties competing with their Swedish counterparts, since the Swedish Government subsidises the production of reindeer meat. Moreover, traditional Finnish Sami reindeer herdsmen in the north of Finland have difficulties competing with the reindeer meat producers in the south of the Sami Homeland, who use fencing and feeding with hay, methods very distinct from the nature-based traditional Sami methods.

2.6 The authors observe that logging is not the only activity with adverse consequences for Sami reindeer herding. They concede that the dispute concerns a specific geographic area and the logging and construction of roads in the area. However, they believe that other activities, such as quarrying, that have already taken place, and such logging as has taken place or will take place, as well as any future mining (for which licences have already been granted by the Ministry of Trade and Industry), on the total area traditionally used by the Samis, should be taken into consideration when considering the facts of their new case. In this context, the authors refer to the Central Forestry Board's submission to the Inari Court of First Instance (Inarin kihlakunnanoikeus) of 28 July 1993, where the Board expressed its intention of logging, by the year 2005, a total of 55,000 cubic metres of wood from 1,100 hectares of forests in the Western parts of the winter herding lands of the Muotkatunturi Herdsmen's Committee. The authors observe that logging has already been carried out in other parts of the winter herding lands, in particular in the Paadarskaidi area in the Southeast.

2.7 The authors reiterate that the situation is very difficult for Samis in the north of Finland, and that any new measure causing adverse effects on reindeer herding in the Angeli area would amount to a denial of the local Samis' right to enjoy their own culture. In this context, the authors invoke paragraph 9.8 of the Views in Communication No. 511/1992, which they interpret as a warning to the State party regarding new measures that would affect the living conditions of local Samis.

2.8 As to the requirement of exhaustion of domestic remedies, the authors filed a complaint, invoking article 27 of the Covenant, with the Inari Court of First Instance (Inarin kihlakunnanoikeus). The authors asked the Court to prohibit any logging or construction of roads on a limited geographic area. The Court declared the case admissible but decided against the authors on the merits on 20 August 1993. According to the Court, the disputed activities would have caused some adverse effects for a limited period of time, but only to a minor degree.

2.9 The authors then appealed to the Rovaniemi Court of Appeal (Rovaniemen hovioikeus) which, after oral hearings, delivered judgment on 16 June 1994. The Appeal Court found that the adverse consequences of the disputed activities were much more severe than the Court of First Instance had held. Still, two judges of the three-member panel came to the conclusion that the adverse effects for reindeer herding did not amount to a "denial of right to enjoy their culture" within the meaning of article 27 of the Covenant. The Court of Appeal considered that it had not been proven "that logging in the land specified in the petition and road construction ... would prevent them from enjoying in community with other members of their group the Sami culture by practising reindeer herding". The third judge dissented, arguing that logging and construction of roads should be prohibited and stopped. The authors sought leave to appeal before the Supreme Court (Korkein oikeus), pointing out that they were satisfied with the establishment of the facts by the Court of Appeal, and asking the Supreme Court to review only the issue of whether the adverse consequences of the activities amounted to a "denial" of the authors' rights under article 27 of the Covenant. On 23 September 1994, the Supreme Court granted leave to appeal, without ordering interim measures of protection. On 10 November 1994, however, it ordered the Central Forestry Board to suspend the activities that had been initiated in late October 1994. On 22 June 1995, the Supreme Court confirmed the Court of Appeal's judgment in its entirety and withdrew the interim injunction. The authors contend that no further domestic remedies are available to them.

Complaint

3.1 The authors claim that the facts as described violate their rights under article 27, and invoke the Committee's Views on the cases of Ivan Kitok v. Sweden (Communication No. 197/1985), Ominayak v. Canada (Communication No. 167/1984) and Ilmari Länsman et al. v. Finland (Communication No. 511/1992), as well as ILO Convention No. 169 on the rights of indigenous and tribal people in independent countries, the Committee's General Comment No. 23[50] on article 27, and the draft United Nations declaration on the rights of indigenous peoples.

3.2 Finally, the authors, who contend that logging and road construction might resume in October or November 1995 and is therefore imminent, request interim measures of protection under rule 86 of the rules of procedure, so as to prevent irreparable damage.

Further submissions by the parties

4.1 On 15 November 1995, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure. Pursuant to rule 86 of the rules of procedure, the State party was requested to refrain from adopting measures which would cause irreparable harm to the environment which the authors claim is vital to their culture and livelihood. The State party was requested, if it contended that the request for interim protection was not appropriate in the circumstances of the case, to so inform the Committee's Special Rapporteur for New Communications and to give reasons for its contention. The Special Rapporteur would then reconsider the appropriateness of maintaining the request under rule 86.

4.2 By further submission of 8 December 1995, the authors note that the Upper Lapland Branch of the Central Forestry Board started logging in the area specified in the present communication on 27 November 1995. The logging activities are scheduled to continue until the end of March 1996: the target is to cut some 13,000 cubic metres of wood. Between 27 November and 8 December 1995, some 1,000 cubic metres had been cut over an area covering 20 hectares. Given this situation, the authors request the Committee to reiterate the request under rule 86 and urge the State party to discontinue logging immediately.

4.3 On the other hand, a group of Sami forestry officials from the Inari area who earn their living from forestry and wood economy, by submission of 29 November 1995 addressed to the Committee, contend that forestry as practised today does not hamper reindeer husbandry and that both reindeer husbandry and forestry can be practised simultaneously in the same areas. This assessment was confirmed by the Supreme Court of Finland in a judgment of 22 June 1995. If forestry activities in the Inari area were to be forbidden, Sami groups practising two different professions would be subject to unequal treatment.

4.4 In a submission dated 15 December 1995, the State party contends that interim measures of protection should be issued restrictively and only in serious cases of human rights violations where the possibility of irreparable damage is real, e.g. when the life or physical integrity of the victim is at stake. In the State party's opinion, the present communication does not reveal circumstances pointing to the possibility of irreparable damage.

4.5 The State party notes that the present logging area covers an area of not more than 254 hectares, out of a total of 36,000 hectares of forest owned by the State and available for reindeer husbandry to the Muotkatunturi Herdsmen's Committee. This area includes the surface of the Lemmenjoki National Park, which obviously is off limits for any logging activity. The logging area consists of small separate surfaces treated by "seed tree felling", for natural regeneration. "Virgin forest areas" are left untouched in between the logged surfaces.

4.6 The State party notes that the Finnish Central Forestry Board had, in a timely manner and before beginning logging activities, negotiated with the Muotkatunturi Reindeer Husbandry Association, to which the authors also belong; this Association had not opposed the logging plans and schedule. The letter referred to in paragraph 4.3 above demonstrates, to the State party, the need for coordination of various and diverging interests prevalent in the way of life of the Sami minority. The State party finally observes that some of the authors have logged their privately owned forests; this is said to demonstrate the "non-harmfulness" of logging in the area in question.

4.7 In the light of the above, the State party regards the request under rule 86 of the rules of procedures as inappropriate in the circumstances of the case, and requests the Committee to set aside the request under rule 86. Notwithstanding, it undertakes not to elaborate further logging plans in the area in question, and to decrease the current amount of logging by 25 per cent, while awaiting the Committee's final decision.

4.8 The State party concedes that the communication is admissible and pledges to formulate its observations on the merits of the claim as soon as possible.

Committee's decision on admissibility

5.1 During its fifty-sixth session, the Committee considered the admissibility of the communication. It noted the State party's argument that the request for interim measures of protection in the case should be set aside, and that the communication met all admissibility criteria. It nonetheless examined whether the communication met the admissibility criteria under articles 2, 3 and 5, subparagraphs 2 (a) and (b), of the Optional Protocol, concluded that it did, and that the authors' claim under article 27 should be examined on its merits.

5.2 On 14 March 1996, therefore, the Committee declared the communication admissible and set aside the request for interim measures of protection.

State party's observations on the merits and counsel's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party supplements and corrects the facts as presented by the authors. It recalls that part of the Muotkatunturi Herdsmen's Committee's herding area belongs to the Lemmenkoji Natural Park, an area of pine-dominated forest suitable for reindeer herding during winter time. As to the consultation process between National Forest and Park Service (hereafter NFPS - formerly called the Central Forestry Board) and local Sami reindeer herders, it notes that the representatives of the NFPS had contacted the chairman of the reindeer owners' association, J.S., who in turn invited the representatives of the NFPS to the extraordinary meeting of the Muotkatunturi Herdsmen's Committee on 16 July 1993. Planned logging activities were discussed and amendments agreed upon during the meeting: i.e. reverting to use of winter roads and exclusion of the northern part of the logging area. The records of the Inari District Court (28 July 1993) show that two opinions were presented during the meeting: one in support of and one against the authors. The Muotkatunturi Herdsmen's Committee did not make statements directed against the NFPS.

6.2 The State party further recalls that some Sami are forest owners and practise forest management, whereas others are employed by the NFPS in functions related to forest management. It emphasizes that the authors' comparison of surface areas to be logged is not illustrative, as it does not relate to forest management practices. Instead, it would be preferable to compare plans of the NFPS with plans for logging of private forests in the Angeli area: thus, the NFPS plans logging activities covering 900 hectares by the year 2005, whereas the regional plan for private forests of the Angeli area (years 1994-2013) includes forest regeneration of 1,150 hectares by using the seed tree method.

6.3 The State party recalls that the authors' claims were thoroughly examined by the domestic courts (i.e. the Inari District Court, the Rovaniemi Court of Appeal and the Supreme Court). At every instance, the court had before it extensive documentation, on the basis of which the case was examined, inter alia, in the light of article 27 of the Covenant. All three instances rejected the authors' claims explicitly by reference to article 27. The State party adds that the requirements of article 27 were consistently taken into account by the State party's authorities in their application and implementation of the national legislation and the measures in question.

6.4 In the above context, the State party contends that, given that the authors conceded before the Supreme Court that the Court of Appeal of Rovaniemi had correctly established the facts, they are in fact asking the Committee to assess and evaluate once again the facts in the light of article 27 of the Covenant. The State party submits that the national judge is far better positioned than an international instance to examine the case in all of its aspects. It adds that the Covenant has been incorporated into Finnish law by Act of Parliament, and that its provisions are directly applicable before all Finnish authorities. There is thus no need to argue, as the authors chose to do, that the Finnish courts refrain from interpreting the Covenant's provisions and to wait for the Committee to express itself on "borderline cases and new developments". In the same vein, there is no ground for the authors' argument that the interpretation of article 27 of the Covenant by the Supreme Court and Court of Appeal is "minimalist" or "passive".

6.5 The State party acknowledges that the Sami community forms an ethnic community within the meaning of article 27 of the Covenant and that the authors, as members of that community, are entitled to protection under the provision. It reviews the Committee's jurisprudence on article 27 of the Covenant, including the Views on Communication No. 167/1984 (B. Ominayak and members of the Lubicon Lake Band v. Canada), Communication No. 197/1985 (Kitok v. Sweden) and Communication No. 511/1992 (I. Länsman v. Finland) and concedes that the concept of "culture", within the meaning of article 27, covers reindeer husbandry, as an essential component of the Sami culture.

6.6 The State party also admits that "culture", within the meaning of article 27, provides for protection of the traditional means of livelihood for national minorities, insofar as they are essential to the culture and necessary for its survival. Not every measure or its consequences, which in some way modify the previous conditions, can be construed as a prohibited interference with the right of minorities to enjoy their own culture. This line of reasoning has been followed by the Parliamentary Committee for Constitutional Law, which has stated that Finland's obligations under international conventions mean that reindeer husbandry exercised by the Sami must not be subjected to unnecessary restrictions.

6.7 The State party refers to the Committee's General Comment on article 27,[55] which acknowledges that the protection of rights under article 27 is directed to ensuring "the survival and continued development of the cultural, religious and social identity of the minorities concerned" (para. 9). It further invokes the ratio decidendi of the Committee's Views on Communication No. 511/1992 (I. Länsman et al. v. Finland), where it was held that States parties may understandably wish to encourage economic development and allow economic activity and that measures which have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a violation of article 27. The State party argues that the present communication is in many respects similar to Communication No. 511/1992, i.e. (a) the responsibility for the contested activities lies once again with the State party; (b) the contested measures merely have a certain limited impact; (c) economic activities and conduct of reindeer husbandry have been reconciled in an appropriate manner; and (d) earlier logging and future logging plans were explicitly taken into consideration in the resolution of the case by the domestic courts.

6.8 In addition, the State party points to the solution of a comparable case by the Supreme Court of Norway, where submersion of a small land area after construction of a hydroelectric dam had been challenged by local Samis. In that case, too, the decisive point for the Supreme Court was the factual extent of the interference with the interests of the local Sami, which was deemed to be too small to raise issues of minority protection under international law. The Supreme Court's reasoning was subsequently endorsed by the European Commission of Human Rights. The State party concludes that the Committee's case law shows that not all measures imputable to the State amount to a denial of the rights under article 27: this principle is said to apply in the present case.

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[55] General Comment 23[50], adopted in April 1994.

6.9 Still in relation to the authors' argument that different rights and interests cannot be reconciled, and that the right of the Sami to practise reindeer herding should have precedence over the practice of other rights, such as the right to log forests, the State party asserts that the interests of both forestry and reindeer management can be and have been taken into account and reconciled when measures related to forestry management were or are being planned. This is generally done by the NFPS. The reconciliation is not only possible in the area referred to by the authors and in the entire region in which reindeer husbandry is practised, but it is also a significant issue, as reindeer husbandry is practised in the entire area inhabited by the Sami. It is noted that this type of reconciliation was explicitly approved by the Committee in its Views on Communication No. 511/1992 (para. 9.8), where it was admitted that "economic activities must, in order to comply with article 27, be carried out in a way that enables the authors to continue to benefit from reindeer husbandry". The State party adds that measures related to forestry management can benefit the reindeer husbandry in many cases, and that many herdsmen simultaneously practise forestry.

6.10 In the State party's view, the authors merely raise before the Committee the same issues they had been raising before the domestic courts: i.e. what types of measures in the areas concerned trigger the "threshold" beyond which measures must be regarded as a "denial", within the meaning of article 27, of the Samis' right to enjoy their own culture. Before the local courts, the impairments to reindeer husbandry caused by logging and road construction were deemed to be below this threshold. In the State party's opinion, the authors have failed to adduce new grounds which would enable the Committee to assess the "threshold" issue in any other way than the domestic courts.

6.11 In this context, the State party argues that if the concept of "denial", within the meaning of article 27, is interpreted as widely as by the authors, this would in fact give the Sami reindeer herders the right to reject all such activities which are likely to interfere with reindeer husbandry even to a small extent: "[t]his kind of right of veto with respect to small-size reasonable legal activities of the landowners and other land users would be simultaneously given to the herdsmen practising husbandry and would thus have a significant influence on the decision-making system". Simultaneously, legislation governing the exploitation of natural resources as well as the existing plans for land use would become "almost useless". This, the State party emphasizes, cannot be the purpose and object of the Covenant and of article 27. It should further be noted that since the Samis' right to practise reindeer husbandry is not restricted to the State-owned area, the Committee's decision will have serious repercussions on how private individuals may use and exploit land they own in the area of reindeer husbandry.

6.12 In the State party's opinion, the Committee's insistence on the principle of "effective participation of members of minority communities in decisions which affect them",[56] principle which was reiterated in the Views on Communication No. 511/1992, was fully applied in the instant case. The area in which interests of forestry management and reindeer husbandry co-exist and possibly conflict forms part of the area of the Muotkatunturi Herdsmen's Committee (the legal entity responsible for matters relating to reindeer husbandry). The State party and the Herdsmen's Committee have had continuous negotiation links in a framework in which interests of forestry and reindeer husbandry are reconciled. The State party contends that the experiences with this negotiation process have been good and that it guarantees the Samis' right to conduct reindeer husbandry in accordance with article 27. The NFPS has been in constant contact with the Muotkatunturi Herdsmen's Committee, of which the authors are members.

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[56] General Comment No. 23[50], paragraph 7.

6.13 The State party explains that reindeer management has been partly transformed into an activity that uses the possibilities offered by forestry management. Herdsmen use roads constructed for the purpose of forestry management: it is recalled that in the privately owned forests in the area of the Muotkatunturi Herdsmen's Committee, logging has been carried out by those practising reindeer husbandry. Furthermore, the State party notes, forestry management practised by Samis does not differ from the way other private forest owners practise forestry management. If the forestry and logging methods used in areas administered by the NFPS are compared with the logging methods used in privately owned forests and by Samis, the lighter methods of forestry management used by the NFPS and manual logging are more mindful of the interests of reindeer husbandry than logging in privately owned forests carried out by machines. The NFPS intends to carry out manual logging, a more natural method than the mechanical logging which was carried out in privately owned forests in the Angeli area in the winter of 1993-1994. Manual logging is moreover closer to the traditional way of life and the culture of the Sami, and its effects on them thus lighter.

6.14 The State party concludes that the authors' concern over the future of reindeer husbandry have been taken into account in an appropriate way in the present case. While the logging and tracks in the ground will temporarily have limited adverse effects on the winter pastures used by the reindeer, it has not been shown, in the State party's opinion, that the consequences would create considerable and long-lasting harm, which would prevent the authors from continuing reindeer husbandry in the area under discussion on its present scale. The authors are not, accordingly, denied their right to enjoy their own culture within the meaning of article 27 of the Covenant.

7.1 In their comments, the authors begin by noting that logging in the Pyhäjärvi area, a part of the area specified in their complaint, was completed in March 1996. Adverse consequences of the logging for reindeer are said to be mostly of a long-term nature. The authors and other reindeer herdsmen have however already observed that the reindeer use neither the logging area nor "virgin forest areas" in between the logging areas as pasture. During the winter of 1996, therefore, a considerable part of the winter herding lands of the Muotkatunturi Herdsmen's Committee has been unaccessible for the reindeer. This has caused the reindeer herders much extra work and additional expenses, in comparison to previous years.

7.2 According to the authors, some of the negative consequences of the logging will only materialize after several years or even decades. For example, one particularly difficult winter during which a solid ice layer would prevent reindeer from digging lichen through the snow may cause the starvation of many reindeer, because of the absence of their natural emergency resource, i.e. the lichen growing on old trees. If storms send down the remaining trees, there is a distinct danger of large areas becoming totally treeless, thereby causing a permanent reduction in the surface of winter herding lands for the Muotkatunturi Herdsmen's Committee.

7.3 Counsel observes that because the economic benefit from reindeer herding is low, many reindeer herdsmen have had to look for additional sources of income. This development has been accelerated as most herding committees have been forced to cut the number of their herds. The necessity to reduce the herds has been caused by the scarcity of herding lands and the poor condition of existing, over-used herding lands. In such a situation, suitable winter herding areas are a truly critical resource, which determine the scale of reductions in the number of reindeer belonging to each herdsmen's committee. The authors themselves developed other economic activities besides reindeer herding in order to survive. They work as butchers for other herdsmen's committees, work for private local landowners or conduct small-scale logging within their own private forests. All, however, would prefer to work solely in reindeer herding.

7.4 As to the extent of the logging already carried out, counsel transmits four photographs, including aerial photographs, which are said to provide a clear understanding of the nature and impact of the logging: very few trees remain in logged areas of up to 20 hectares, and all old trees, rich with lichen, have been cut.

7.5 The authors dismiss as misleading the State party's observations on the magnitude and nature of the logging, as the 254 hectares mentioned by the State party relate only to logging already completed. The NFPS however plans to continue logging in the area specified in the complaint. If comparisons are made with a larger area, the authors recall the long-lasting and extensive logging, in Paadarskaidi, another part of the winter herding area of the Muotkatunturi Herdsmen's Committee. The consequences of logging activities in Paadarskaidi are said to be alarming, since the reindeer simply have abandoned this area. The authors also challenge the State party's comments on the logging methods and submit that so-called seed-tree felling is also harmful for reindeer herding, as the animals do not use such forests for a number of reasons. In addition, there is the danger that storms fell the seed trees and the area gradually becomes treeless.

7.6 Counsel emphasizes that if two of the authors have sought additional income from forestry this has not been of their free choice and in no way indicates that logging would be part of the Sami way of life. He criticizes the State party's observations which use this argument against the authors, rather than taking it as a serious indicator of developments which endanger the Sami culture and the Sami way of life. It is submitted that the State party's attempt to explain "manual logging" as being close to the traditional way of life and culture of the Sami is totally unfounded and distorts the facts.

7.7 The authors point specifically to the magnitude of the different logging projects in the area. Of a total of 255,000 hectare area of the Muotkatunturi Herdsmen's Committee, some 36,000 hectares are forests administered by the NFPS. The most suitable winter herding lands of the Muotkatunturi Herdsmen's Committee are located within these State-administered areas, deep in the forests. Privately owned forests cover some 14,600 hectares and are owned by 111 separate owners. Most of the privately owned forests do not exceed 100 hectares and are typically located along the main roads. They are accordingly, much less suitable for reindeer herding as for example the strategically important winter herding areas identified by the authors in the present case.

7.8 The authors challenge the State party's affirmation that there was "effective participation" of the Muotkatunturi Herdsmen's Committee and themselves in the negotiation process. Rather, they assert, there was no negotiation process and no real consultation of the local Sami when the State forest authority prepared its logging plans. At most, the Chairman of the Muotkatunturi Herdsmen's Committee was informed of the logging plans. In the authors' opinion, the facts as established by the Finnish courts do not support the State party's contention. The Sami furthermore are generally dissatisfied with the way the State forest authorities exercise their powers as "landowners". On 16 December 1995, the Sami Parliament discussed the experiences of Sami consultation in relation to logging plans by the State party forest authorities. The resolution adopted notes, inter alia, that it is "[t]he opinion of the Sami Parliament that the present consultation system between the Central Forestry Board and reindeer management does not function in a satisfactory way ...".

7.9 As far as logging in the Angeli area is concerned, the authors note that, even under the terms of the State party's submission, the "negotiations" only proceeded after the authors had instituted court proceedings in order to prevent the logging. The local Sami "had become coincidentally aware" of existing logging plans, upon which the authors instituted court proceedings. The authors contend that what the State party refers to as "negotiations" with local reindeer herdsmen amounts to little more than invitations extended to the chairmen of the herdsmen's committees to annual forestry board meetings, during which they are informed of short-term logging plans. This process, the authors emphasize, involves no real consultation of the Sami. They express their desire to have a more significant influence on the decision-making processes leading to logging activities within their homelands, and refute the State party's view on the perceived good experiences with the existing consultation process (see para. 6.12 above).

7.10 Concerning the State party's argument that the authors in fact seek a re-evaluation by the Committee of evidence already thoroughly examined and weighed by the local courts, the authors affirm that the only contribution they seek from the Committee is the interpretation of article 27, not any "reassessment of the evidence", as suggested by the Government. They dismiss as irrelevant the observations of the State party on the role of the national judge (see para. 6.4 above).

7.11 As to the State party's comments referred to in paragraph 6.7 above, the authors largely agree with the former's points relating to the Government's responsibility for interference with Sami rights and the weighing of all relevant activities and their impact by the local courts. They strongly disagree with the State party's second point, namely that the measures agreed to and carried out only have a limited impact. In the first Länsman case, the Committee could limit its final assessment to activities which had already been concluded. The present case not only concerns such logging as has already been conducted, but all future logging within the geographical area specified in the complaint. Thus, the winter herding lands in question in the present case are of strategic importance to the local Sami: logging causes long-lasting or permanent damage to reindeer herding, which does not end when the activity itself is concluded. Therefore, the "limited impact" of quarrying on Mt. Riutusvaara, which was at the basis of the first case,[57] cannot be used as a yardstick for the determination of the present case, where the adverse consequences of logging are said to be of an altogether different magnitude.

7.12 The authors equally disagree with the State party's contention that there was an appropriate reconciliation between the interests of reindeer herdsmen and economic activities, noting that the logging plans were drawn up without the authors' participation or of the local Sami in general.

7.13 The authors challenge the State party's assessment of the impact of the logging activities already carried out on the author's ability to continue reindeer herding. They believe that the logging which has taken place and, more so, further envisaged logging, will prevent them from continuing to benefit from reindeer husbandry. The Government's optimistic assessment is contrasted with that of the Rovaniemi Court of Appeal, which admitted that the logging would cause "considerable" and "long-lasting" harm to the local Sami. However, the domestic courts did not prohibit the planned logging activities, because they set the threshold for the application of article 27 in the necessity of "giving up reindeer herding", and not in terms of "continuing to benefit from reindeer husbandry".[58]

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[57] Views on case No. 511/1992 (I. Länsman et al. v. Finland), adopted 26 October 1994.

7.14 In addition to the above, the authors provide information on recent developments concerning Sami rights in Finland. While the development has been positive with respect to constitutional amendments and the formally recognized rule of the Sami Parliament, it has been negative and insecure in other respects, i.e. in relation to the economic well-being of the Sami who live mostly from reindeer herding and associated activities. The authors further refer to a case currently pending before the Supreme Administrative Court of Finland, relating to mining claims staked by Finnish and foreign companies within the Sami homeland. The principal legal basis for the administrative appeals by Sami in this case was article 27 of the Covenant; by decision of 15 May 1996, the Supreme Administrative Court quashed 104 claims which had previously been approved by the Ministry for Trade and Industry, and referred the companies' claim applications back to the Ministry for reconsideration. A decision on the merits of the case remains outstanding.

7.15 The authors conclude that, overall, the logging already conducted by the State party's forestry authorities within the area specified in the communication has caused "immediate adverse consequences to the authors and to the Sami reindeer herdsmen in the Angeli area and the Muotkatunturi Herdsmen's Committee in general". The logging will, and further logging envisaged by the State party's authorities would, result in considerable, long-lasting and even permanent adverse effect to them. To the authors, this conclusion has been well documented and also been confirmed by the judgments of the Rovaniemi Court of Appeal and of the Supreme Court in the case.

8.1 In additional comments dated 27 June 1996, the State party dismisses as groundless the authors' explanations concerning the perceived economic unsuitability of some parts of the logging area. It notes that as far as the possibility of loss of reindeer calves after the harsh winter of 1996 is concerned, possible losses are due to the exceptionally late arrival of spring and the deep cover of snow which has lasted an unusually long time. The situation has been identical for the whole reindeer herding area and since losses are expected all over the reindeer herding area, supplementary feeding of reindeer has been increased accordingly. The State party observes that it is not measures related to forestry management, but the extent of reindeer management that has been the reason for the need to reduce the number of reindeer; continuous over-grazing of herding areas is a well-known fact. Finally, the State party considers it to be "self-evident" that selective seed tree felling is a milder procedure than clear felling.

8.2 As regards logging conducted by the authors themselves, the State party notes that private landowners have independent authority in matters concerning the logging of their own forests. It would be difficult to understand that reindeer owners would carry out logging if its consequences for reindeer herding and for Sami culture were as harmful as the authors contend.

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[58] See Note 3, paragraph 9.8.

8.3 The State party reaffirms, once again, that the processes through which reindeer associations or herdsmen participate in decisions affecting them are effective. The very issue of "effective participation" was discussed in a meeting between the NFPS, the Association of Herdsmen's Committees and different herdsmen's committees on 19 February 1996 in Ivalo. In this meeting, the negotiation system described by the State party in its submission under article 4 (2) of the Optional Protocol was considered useful. The State party also argues that contrary to the authors' assertion, the Muotkatunturi Herdsmen's Committee did not react negatively to the plans for logging initially submitted by the NFPS. The State party regrets that the authors have tended to invoke its comments and observations only partially, thereby distorting the true content of the Finnish Government's remarks.

8.4 As to the impact of logging activities on the authors' ability to carry out reindeer herding, the State party once more refers to the reasoning of the Rovaniemi Court of Appeal, which concluded that it had not "been proven that logging in the land specified in the petition and road construction for any other reasons mentioned by [the authors] would prevent them from enjoying, in community with other members of their group, the Sami culture by practising reindeer herding". For the State party, this conclusion is fully compatible not only with the wording of article 27 of the Covenant but also paragraphs 9.6 and 9.8 of the Committee's Views in the first Länsman case: accordingly, these measures do not create such considerable and long-lasting harm to prevent the authors from continuing reindeer herding even temporarily.

9.1 In additional comments dated 1 July 1996, the authors take issue with some of the State party's observations referred to in paragraph 8.1 above. In particular, they challenge the Government's assertion that selective seed tree felling is a milder procedure than clear felling, and submit that in the extreme climatic conditions of the area in question, so-called "selective felling", which leaves no more than 8 to 10 trees per hectare, has the same consequences as clear felling. Moreover, the negative effect on reindeer herding is the same due to the growing impact of storms, the remaining trees might fall.

9.2 The authors submit that if the Government invokes the argument that the effects of selective cutting are milder than in the case of clear felling, the only conclusion should be that all further logging in the area in question should be postponed until objective and scientific findings show that the forest in the area already logged - the Pyhäjärvi area - has recovered. The authors further note that the Government's submission is patently mistaken if it states that "logging does not concern the Pyhäjärvi winter feeding area", since the area already logged is called "Pyhäjärvi" even by the NFPS itself and is located in the winter feeding area of the Muotkatunturi Herdsmen's Committee.

9.3 On the issue of "effective participation", the authors contend that meetings such as the one of 19 February 1996 referred to by the State party (see paragraph 8.3 above) do not serve as a proper vehicle for effective participation. This was reconfirmed by the Sami Parliament on 14 June 1996, when it once again stated that the NFPS does not cooperate with the herdsmen's committees in a satisfactory manner. The authors deny that they have in any way distorted the contents of the State party's earlier submissions, the conclusions of the Rovaniemi Court of Appeal, or of the Committee's Views in the first Länsman case.

Examination of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information provided by the parties, as required to do under article 5, paragraph 1, of the Optional Protocol. The issue to be determined is whether logging of forests in an area covering approximately 3,000 hectares of the area of the Muotkatunturi Herdsmen's Committee (of which the authors are members) - i.e. such logging as has already been carried out and future logging - violates the authors' rights under article 27 of the Covenant.

10.2 It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture; that some of the authors practice other economic activities in order to gain supplementary income does not change this conclusion. The Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community.[59]

10.3 Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27. As noted by the Committee previously in its Views on Communication No. 511/1992, however, measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.

10.4 The crucial question to be determined in the present case is whether the logging that has already taken place within the area specified in the communication, as well as such logging as has been approved for the future and which will be spread over a number of years, is of such proportions as to deny the authors the right to enjoy their culture in that area. The Committee recalls the terms of paragraph 7 of its General Comment on article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".

10.5 After careful consideration of the material placed before it by the parties, and duly noting that the parties do not agree on the long-term impact of the logging activities already carried out and planned, the Committee is unable to conclude that the activities carried out as well as approved constitute a denial of the authors' right to enjoy their own culture. It is uncontested that the Muotkatunturi Herdsmen's Committee, to which the authors belong, was consulted in the process of drawing up the logging plans and in the consultation, the Muotkatunturi Herdsmen's Committee did not react negatively to the plans for logging. That this consultation process was unsatisfactory to the authors and was capable of greater interaction does not alter the Committee's assessment. It transpires that the State party's authorities did go through the process of weighing the authors' interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management, i.e. logging methods, choice of logging areas and construction of roads in these areas. The domestic courts considered specifically whether the proposed activities constituted a denial of article 27 rights. The Committee is not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors' rights under article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied article 27 of the Covenant in the light of the facts before it.

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[59] Cf. Views on Communication No. 197/1985 (Kitok v. Sweden), Views adopted 27 July 1988, para. 9.2; on Communication No. 511/1992 (I. Länsman et al. v. Finland), adopted 26 October 1994, para. 9.1.

10.6 As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party's forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsmen, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors.

10.7 The Committee considers that if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal a breach of article 27 of the Covenant.

T. Communication No. 692/1996; A. R. J. v. Australia (Views adopted on 28 July 1997, sixtieth session)[*]

Submitted by: A. R. J. [represented by counsel]

Victim: The author

State party: Australia

Date of communication: 6 February 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 1997,

Having concluded its consideration of Communication No. 692/1996 submitted to the Human Rights Committee by Mr. A. R. J. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[**]

1. The author of the communication is A. R. J., a citizen of the Islamic Republic of Iran born in 1968, at the time of submission of his communication detained at the Regional Prison in Albany, Western Australia. He claims to be a victim of violations by Australia of article 2, paragraph 1; article 6, paragraph 1; article 7; article 14, paragraphs 1, 3 and 7; article 15, paragraph 1; and article 16 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author was a crew member of a vessel of the Iranian Shipping Line and was arrested on 15 December 1993 at Esperance, Western Australia, for illegal importation and possession of two kilograms of cannabis resin, in contravention of section 233B(1) of the Customs Act (Cth). He had tried to sell the cannabis to an undercover customs agent. He was sentenced to five years and six months of imprisonment in April 1994; the Court set a non-parole period of two years and six months, which expired on 7 October 1996.

2.2 On 13 June 1994, the author applied for refugee status and a Protection (Permanent) Entry Permit to the Department of Immigration and Ethnic Affairs.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[**] Pursuant to rule 85 of the Committee's rules of procedure, Ms. Elizabeth Evatt did not participate in the examination of the case.

On 19 July 1994, this application was refused at first instance by an officer who represented the Minister for Immigration and Ethnic Affairs. He was of the opinion that Mr. J. did not face any real threat of persecution in the Islamic Republic of Iran relevant to the applicability of the 1951 Convention relating to the Status of Refugees.

2.3 On 10 August 1994, the author applied for review of the decision to the Refugee Review Tribunal. The review had not been completed when, on 1 September 1994, changes to the Australian Migration Act and Migration Regulations took effect. Under the new rules, the author's application now had to be regarded as an application for a protection visa. On 10 November 1994, the Refugee Review Tribunal confirmed the original decision of 19 July 1994. The Tribunal held that the author's fear of being returned to the Islamic Republic of Iran was based on his drug-related conviction in Australia and that he had not raised any other argument that he would face serious difficulties if he were to be returned to his native country.

2.4 The Tribunal concluded: "While it has sympathy for the applicant in that, should he return to the Islamic Republic of Iran, it is likely that he would face treatment of an extremely harsh nature, the applicant cannot be considered to be a refugee. The applicant must have a well founded fear of being persecuted for one of the reasons stated in the Convention, that is, race, religion, nationality, membership of a particular social group or political opinion. The applicant's fear does not arise for any of those reasons ... [but] solely out of his conviction for a criminal act ...".

2.5 Early in 1995, Justice Lee ordered that the author's deadline for filing an application for an order of review of the Refugee Review Tribunal's decision be extended to 25 May 1995, and that an amended application which was filed on 24 May 1995 stand as an amended application for review before the Federal Court of Australia.

2.6 On 14 November 1995, Justice French delivered the judgment of the Federal Court of Australia. The judgment concluded that the author had failed to show any error of reasoning of the Refugee Review Tribunal, or any basis upon which he could be said to attract Convention protection. Nonetheless, the risk to which he might be exposed upon return to the Islamic Republic of Iran was a matter of serious concern. The possibility that the author might be subjected to an unfair trial, to imprisonment and to torture were not matters to be put aside lightly in a country with a humanitarian tradition. The question of whether or not the author could be returned to another country or be permitted to remain in Australia for some time on another basis was not, however, before the Court. The issue before the Court was whether or not the Refugee Review Tribunal had erred in finding that he did not attract Refugee Convention protection. This not being the case, the application had to be dismissed.

2.7 In the light of the Federal Court's finding, the Legal Aid Commission of Western Australia was of the view that a further appeal to the full bench of the Federal Court of Australia would be futile and that legal aid should not be made available for the purpose. However, the author filed a request with the Legal Aid Commission of Western Australia to make representations to the Minister for Immigration and Ethnic Affairs to exercise his discretion to allow Mr. J. to remain in Australia on humanitarian grounds.

2.8 On 11 January 1996, the author was informed by Legal Aid Western Australia that the Minister was unprepared to exercise his discretion under Section 417 of the Migration Act to allow Mr. J. to remain in Australia on humanitarian grounds. Counsel then expressed the view that it was unlikely that anything further could be done on the author's behalf.

2.9 The Guidelines for Humanitarian Recommendations provide non-exhaustive guidelines to members of the Refugee Review Tribunal and to the review Officer or to tribunal members on the exercise of their recommendatory functions. They lay down that:

(a) It is in the interest of Australia as a humane society to ensure that individuals who do not meet the technical definition of a refugee are not returned to their country of origin if there is a reasonable likelihood that they will face a significant, individualized threat to their personal security upon return;

(b) It is in the public interest that protection offered on humanitarian grounds, which is not based on international obligations, but on positive, discretionary considerations, is only offered to individuals with genuine and pressing needs;

(c) As a discretionary measure, the granting of a stay on humanitarian grounds must be limited to exceptional cases presenting elements of threat to personal security and intense personal hardship;

(d) It would not be appropriate as part of the refugee status determination procedure to address cases of a compassionate nature, such as family difficulties, economic hardship or medical problems, not involving serious violations of human rights;

(e) It is not intended to address broad situations of differentiation between particular groups or elements of society within other countries;

(f) The Guidelines should only apply to individuals whose circumstances and characteristics provide them with a sound basis for expecting to face a significant threat to personal security upon their return, as a result of targeted actions by persons in the country of return;

(g) To ensure that remedies offered under this process are limited to genuine cases, one should not consider on humanitarian grounds any individuals who (i) have a safe third country to which to go; (ii) who could subsequently alleviate the perceived risk by relocation to a region of safety within the country of origin; or (iii) who is seeking residence in Australia mainly to secure better social, economic or education opportunities.

2.10 It is stated that the author's case was also submitted to the Office of the United Nations High Commissioner for Refugees for appropriate action. There had been no reaction from this office at the time of submission of the communication to the Committee.

Complaint

3.1 The author claims that Australia would violate article 6 if it were to return him to the Islamic Republic of Iran. It is said to be a fact that individuals who commit drug-related offences are subject to the jurisdiction of Islamic Revolutionary Tribunals, and that there would be a real possibility that the author may be persecuted because he was convicted of an offence which had a connection with an Iranian Government agency - i.e. the Iranian Shipping Line of which the author was an employee - and that such persecution could lead to the ultimate sanction.

3.2 It is submitted that there is a consistent pattern of the use of the death penalty for drug-related offences in the Islamic Republic of Iran. The author notes that the imposition of the death penalty in Islamic Revolutionary Courts after trials which fail to meet international standards of due process violates the right to life protected by article 6 and also contravenes the second Optional Protocol on the Abolition of the Death Penalty, to which Australia has acceded.

3.3 The author contends that his deportation to the Islamic Republic of Iran would violate article 7 of the Covenant, as well as article 3 of the Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment. To surrender a prisoner knowingly to another State where there are substantial grounds for believing that he would be in danger of being tortured, while not explicitly covered by the wording of article 7 of the Covenant, would clearly run counter to its object and purpose. Reference is made to the judgment of the European Court of Human Rights in Soering v. United Kingdom[60] as well as to a judgment of the French Conseil d'Etat of 27 February 1987.[61] On the basis of information readily available in reports submitted to the United Nations Commission on Human Rights and in reports prepared by other governmental or non-governmental organizations, and in the light of the comments made by the Refugee Review Tribunal and by Justice French, the author's involuntary repatriation to the Islamic Republic of Iran would give rise to issues under article 7.

3.4 It is claimed that if the author were to be deported to the Islamic Republic of Iran, Australia would violate article 14. The nature of the offence of which the author was convicted constitutes a crime against the laws of Islam, and Islamic Revolutionary Tribunals have jurisdiction for the type of offence the author stands convicted of. It is said to be accepted that these revolutionary courts do not observe internationally accepted rules of due process, that there is no right of appeal, and that the accused is generally unrepresented by counsel. This view was shared by Justice French of the Federal Court of Australia.

3.5 The author contends that any prosecution in the Islamic Republic of Iran, in the event of his deportation, would be contrary to article 14, paragraph 7, of the Covenant, since he would face the serious prospect of double jeopardy. Therefore, his forcible deportation to his native country would, in all likelihood, amount to complicity to double jeopardy.

3.6 The author further claims violations of articles 15 and 16 of the Covenant and seeks to substantiate said allegations. Counsel seeks interim measures of protection under rule 86 of the rules of procedure on behalf of his client, who may face repatriation to the Islamic Republic of Iran at any moment.

State party's information and observations on the admissibility and the merits of the communication

4.1 In a submission dated 17 October 1996, the State party offers comments both on the admissibility and the merits of the case. As to the author's claim under article 2, it argues that the rights under this provision are accessory in nature and linked to the other specific rights enshrined in the Covenant. It recalls the Committee's interpretation of a State party's obligations under article 2, paragraph 1, pursuant to which if a State party takes a decision concerning a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.[62] It notes however that the Committee's jurisprudence has been applied so far to cases concerning extradition, whereas the author's case raises the issue of the "necessary and foreseeable consequence" test in the context of expulsion of an individual who was convicted of serious drug offences and who has no legal basis for remaining in Australia: it cannot be said that a retrial for drug trafficking offences is certain or the purpose of returning Mr. J. to the Islamic Republic of Iran.

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[60] Series A No. 161 (1989).

[61] FIDAN's case [1987], Recueil Dalloz - Sirey 305-310.

4.2 In the State party's opinion, a narrow construction of the "necessary and foreseeable consequences" test allows for an interpretation of the Covenant which balances the principle of State party responsibility embodied in article 2 (as interpreted by the Committee) and the right of a State party to exercise its discretion as to whom it grants a right of entry. To the State party, this interpretative approach retains the integrity of the Covenant and avoids a misuse of the Optional Protocol by individuals who entered Australia for the purpose of committing a crime and who do not have valid refugee claims.

4.3 Regarding the author's claim under article 6, the State party recalls the Committee's jurisprudence as set out in the Views on Communication No. 539/1993,[63] and notes that while article 6 of the Covenant does not prohibit the imposition of the death penalty, Australia has, by accession to the second Optional Protocol to the Covenant, undertaken an obligation not to execute anyone within its jurisdiction and to abolish capital punishment. The State party argues that the author has failed to substantiate his allegation that it would be a necessary and foreseeable consequence of his mandatory removal from Australia that his rights under article 6 of the International Covenant on Civil and Political Rights and article 1, paragraph 1, of the second Optional Protocol will be violated; this aspect of the case should be declared inadmissible under article 2 of the Protocol, or dismissed as being without merits.

4.4 The State party adduces several arguments which in its opinion demonstrate that there is no real risk to the author's life if he were to be returned to the Islamic Republic of Iran. It first notes that expulsion is distinguishable from extradition in that extradition results from a request from one State to another for the surrender of an individual to face prosecution or the imposition or enforcement of a sentence for criminal conduct. Accordingly, as a consequence of a request for extradition it is virtually certain that the person will face trial or enforcement of sentence in the receiving State. On the other hand, it cannot be said that such a consequence is certain or the purpose of handing over in relation to the routine deportation or expulsion of a person. For expulsion cases, the State party submits, the threshold question should be whether the receiving state has a clear intention to prosecute the deported person. Without clear intention of an actual intention to prosecute in the first place, allegations such as those raised by the author are purely speculative.

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[62] See Views on communications Nos. 469/1991 (Ch. Ng v. Canada), adopted on 5 November 1993, paragraph 6.2; and 470/1991 (J. Kindler v. Canada), Views adopted 30 July 1993.

[63] Communication No. 539/1993 (Keith Cox v. Canada), Views adopted 31 October 1994, paragraph 16.1.

4.5 The State party submits, still in the context of the claim under article 6, that no arrest warrant is outstanding against the author in the Islamic Republic of Iran, and that the Iranian authorities have no particular interest in the author. Thus, the Australian Embassy in Teheran advised that "... [i]f the Iranians have not sought the assistance of Interpol in this case, then that is the most compelling evidence that the alleged victim will not suffer arrest or re-imprisonment on return for the drug offence. This is a view shared by all Western embassies who have dealt with such cases in the recent past".

4.6 The State party notes that it has, through its embassy in Teheran, sought independent legal advice on the specific circumstances of the author from a lawyer practising in the Islamic Republic of Iran. The advice given was that it is very unlikely that an Iranian citizen who already has served a sentence abroad for a (drug-related) offence will be retried and resentenced. The only possibility of this occurring would be where the penalty incurred abroad is considered far too lenient by the Iranian authorities; these would not consider a six year sentence as too lenient. Furthermore, the State party points out, Iranian law does not provide for the imposition of the death penalty for the trafficking of two kilograms of cannabis resin; rather, the penalty for trafficking between 500 grams and 5 kilograms of cannabis resin is a fine of between 10 and 40 million rials, 20 to 74 lashes and 1 to 5 years imprisonment. In respect of the author's argument that there is a consistent pattern of the use of the death penalty in drug trafficking cases in the Islamic Republic of Iran, the State party notes that reliance on an alleged consistent pattern of resort to the death penalty is insufficient to demonstrate a real risk in the specific circumstances of the alleged victim: Mr. J. offers no evidence that he would personally be at risk of being subject to the death penalty.

4.7 The State party's own inquiries do not reveal any evidence that deportees who were convicted of drug-related offences are at a heightened risk of a violation of the right to life. Thus, the Australian embassy in Teheran has advised that it is unaware of any cases where an Iranian citizen was subjected to prosecution for the same or similar offences. The embassy was advised by another embassy, which handles a high volume of asylum cases, that it had processed several similar cases in recent years and that none of the individuals deported to the Islamic Republic of Iran after serving a prison sentence in that embassy's country had faced problems with the Iranian authorities upon their return. The State party adds that other countries which have deported convicted Iranian drug traffickers have stated that none of the individuals who were so deported were subjected to rearrest or to retrial.

4.8 For the purpose of ascertaining whether there is a real possibility that the author may face the death penalty in the Islamic Republic of Iran, the State party sought legal advice through its embassy in Teheran as to whether Mr. J.'s criminal record would increase his risk of being the subject of adverse attention from the local authorities. The legal advice obtained does not support this proposition. It was further advised that although the author had been arrested once previously in 1989 for consumption of alcohol and was refused work clearance at a petrochemical plant, this does not suggest in any way that he would be rearrested upon return to the Islamic Republic of Iran or subjected to additional adverse attention.

4.9 Finally, the State party argues that the author has failed to substantiate his claim that he might be subjected to extrajudicial execution if returned to his country of origin. It is submitted that an Iranian citizen in the author's position is at no risk of extrajudicial execution, disappearance or detention without trial during which that person might be subject to torture.

4.10 In respect of the author's claim under article 7 of the Covenant, the State party concedes that if Mr. J. were prosecuted in the Islamic Republic of Iran, he might, under the Islamic penal code, be exposed to 20 to 74 lashes. It argues, however, that there is no real risk that the author would be retried and resentenced if returned. Accordingly, this claim is said to be unsubstantiated and without merits.

4.11 The State party argues that the author's allegation that prosecution in an Islamic Revolutionary Court would violate his right under article 14, paragraph 7, of the Covenant is incompatible with the provisions of the Covenant and should be declared inadmissible under article 3 of the Optional Protocol. In this context, it argues that article 14, paragraph 7, does not guarantee ne bis in idem with regard to the national jurisdictions of two or more States - on the basis of the travaux préparatoires of the Covenant and the jurisprudence of the Committee,[64] the State party argues that article 14, paragraph 7, only prohibits double jeopardy with regard to an offence adjudicated in a given State.

4.12 The State party argues that its obligation in relation to future violations of human rights by another State arises only in cases involving a potential violation of the most fundamental human rights and does not arise in relation to Mr. J.'s allegations under article 14, paragraphs 1 and 3. It recalls that the Committee's jurisprudence so far has been confined to cases where the alleged victim faced extradition and where the claims related to violations of articles 6 and 7. In this context, it refers to the jurisprudence of the European Court of Human Rights in the case of Soering v. United Kingdom, where the Court, while finding a violation of article 3 of the European Convention, stated in respect of article 6[65] that issues under that provision might only exceptionally be raised by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of due process in the requesting State. In the instant case, Mr. J. asserts that he will not be afforded due process but provides no evidence to substantiate that in the circumstances of his case, the Iranian courts would be likely to violate his rights under article 14 and that he would have no possibility to challenge such violations. The State party adds that there is no real risk that the author's right to legal representation under article 14, paragraph 3, would be violated. It bases this contention on advice from the Australian embassy in Teheran, which states:

> "In relation to the operation of the Iranian Revolutionary Courts, the Mission's legal advice is that a defendant accused of drug trafficking offences does have the right of legal ... counsel. The defendant can use a court-appointed lawyer or select his/her own. In the latter case, the lawyer selected must be authorized to appear in the Revolutionary Court. The fact that a lawyer's credentials are approved by the Revolutionary

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[64] Communication No. 204/1986 (A.P. v. Italy), declared inadmissible during the thirty-first session (2 November 1987), paragraph 7.3.

[65] That is, the equivalent of article 14 of the International Covenant on Civil and Political Rights.

> Court does not compromise that lawyer's independence. A lawyer who knows and is known to the Court can generally achieve more for a client in the Iranian system. There is also provision for review of a conviction and sentence by a higher tribunal."

4.13 Concerning the claim under article 15, the State party submits that the author's allegation does not fall within the scope of application of the provision and thus should be declared inadmissible ratione materiae under article 3 of the Optional Protocol: while Mr. J. asserts that if he were sentenced under Iranian criminal law he would be subject to a penalty heavier than the one which he served in Australia, he raises no issue of retrospectivity and thus the issue of a violation of article 15 does not arise.

4.14 Finally, as to the claim under article 16, the State party recognizes the author as a person before the law and accepts its obligation to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. It dismisses the author's claim under article 16 as devoid of substantiation and thus inadmissible under article 2 of the Optional Protocol or, subsidiarily, as without merits.

Examination of admissibility and of the merits

5.1 On 3 April 1996, the communication was transmitted to the State party, requesting it to provide information and observations in respect of the admissibility of the communication. Under rule 86 of the Committee's rules of procedure, the State party was requested to refrain from any action that might result in the forced deportation of the author to a country where he is likely to face the imposition of a capital sentence. On 5 March 1997, the Attorney-General of Australia addressed a letter to the Chairman of the Committee, requesting the Committee to withdraw the request for interim protection under rule 86, pointing out that the author had been convicted of a serious criminal offence, after having entered Australia with the express purpose of committing a crime. The State party's immigration authorities had given his applications full and careful consideration. As Mr. J. had become eligible for parole on 7 October 1996, he had been placed under immigration detention pursuant to the Migration Act 1958, pending his deportation. The Attorney-General further noted that the author would be kept in immigration detention as long as the Committee had not reached a final decision on his claims and strongly urged the Committee to decide on Mr. J.'s claims on a priority basis.

5.2 During its fifty-ninth session in March 1997, the Committee considered the Attorney-General's request and gave it careful consideration. It decided that on the balance of the material before it, the request for interim protection should be maintained, and that the admissibility and the merits of the author's case should be considered during the sixtieth session. Counsel was advised to forward his comments on the State party's submission in time for the Committee's sixtieth session. No comments have been received from counsel.

6.1 The Committee appreciates that the State party has, although challenging the admissibility of the author's claims, also provided information and observations on the merits of the allegations. This enables the Committee to consider both the admissibility and the merits of the present case, pursuant to rules 94, paragraph 1, of the Committee's rules of procedure.

6.2 Pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 The author has claimed violations of articles 15 and 16 of the Covenant. The Committee notes, however, that there is no issue of alleged retroactive application of criminal laws in the instant case (article 15). Nor is there any indication that the author is not recognized by the State party as a person before the law (article 16). The Committee therefore considers these claims inadmissible under article 2 of the Optional Protocol.

6.4 The author has claimed a violation of article 14, paragraph 7, because he considers that a retrial in Iran in the event of his deportation to that country would expose him to the risk of double jeopardy. The Committee recalls that article 14, paragraph 7, of the Covenant does not guarantee ne bis in idem with respect to the national jurisdictions of two or more States - this provision only prohibits double jeopardy with regard to an offence adjudicated in a given State.[66] Accordingly, this claim is inadmissible ratione materiae under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

6.5 The State party contends that the author's claims relating to articles 6, 7 and 14, paragraphs 1 and 3, are either inadmissible on the ground of non-substantiation, or because the author cannot be deemed to be a "victim" of a violation of these provisions within the meaning of article 1 of the Optional Protocol. Subsidiarily, it rejects these allegations as being without foundation.

6.6 The Committee is of the opinion that the author has sufficiently substantiated, for purposes of admissibility, his claims under articles 6, 7 and 14, paragraphs 1 and 3, of the Covenant. As to whether he is a "victim" within the meaning of article 1 of the Optional Protocol of violations of the above provisions if the State party were to deport him back to his home country, it is to be recalled that the Refugee Review Tribunal, as well as the decision of the single judge of the Federal Court of Australia, considered it to be a real risk that the author might face treatment of an extremely harsh nature if he were deported to the Islamic Republic of Iran, and that this risk was a matter of serious concern. In these circumstances, the Committee considers that the author has plausibly argued, for purposes of admissibility, that he is a "victim" within the meaning of the Optional Protocol and that he faces a personal and real risk of violations of the Covenant if deported to the Islamic Republic of Iran.

6.7 The Committee therefore concludes that the author's communication is admissible in so far as it appears to raise issues under articles 6, 7 and 14, paragraphs 1 and 3, of the Covenant.

6.8 What is at issue in this case is whether by deporting Mr. J. to the Islamic Republic of Iran, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant. States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other States, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party's obligation, under article 2, paragraph 1, of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most fundamental of these rights.

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[66] See decision on case No. 204/1986 (A. P. v. Italy), declared inadmissible 2 November 1987, paragraphs 7.3 and 8.

6.9 If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

6.10 With respect to possible violations of articles 6, 7 and 14 of the Covenant by Australia's decision to deport the author to the Islamic Republic of Iran, three related questions arise:

(a) Does the requirement under article 6, paragraph 1, to protect the author's right to life and Australia's accession to the second Optional Protocol to the Covenant prohibit the State party from exposing the author to the real risk (that is, the necessary and foreseeable consequence) of being sentenced to death and losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of deportation to the Islamic Republic of Iran?

(b) Do the requirements of article 7 prohibit the State party from exposing the author to the necessary and foreseeable consequence of treatment contrary to article 7 as a result of his deportation to the Islamic Republic of Iran?

(c) Do the fair trial guarantees of article 14 prohibit Australia from deporting the author to the Islamic Republic of Iran if deportation exposes him to the necessary and foreseeable consequence of violations of due process guarantees laid down in article 14?

6.11 The Committee notes that article 6, paragraph 1, of the Covenant must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Australia has not charged the author with a capital offence but intends to deport him to the Islamic Republic of Iran, a State which retains capital punishment. If the author is exposed to a real risk of a violation of article 6, paragraph 2, in the Islamic Republic of Iran, this would entail a violation by Australia of its obligations under article 6, paragraph 1.

6.12 In the instant case, the Committee observes that Mr. J.'s allegation that his deportation to the Islamic Republic of Iran would expose him to the "necessary and foreseeable consequence" of a violation of article 6 has been refuted by the evidence which has been provided by the State party. Firstly and most importantly, the State party has argued that the offence of which he was convicted in Australia does not carry the death penalty under Iranian criminal law; the maximum prison sentence for trafficking the amount of cannabis the author was convicted of in Australia would be five years, i.e. less than in Australia. Secondly, the State party has informed the Committee that the Islamic Republic of Iran has manifested no intention to arrest and prosecute the author on capital charges, and that no arrest warrant against Mr. J. is outstanding in his native country. Thirdly, the State party has plausibly argued that there are no precedents in which an individual in a situation similar to the author's has faced capital charges and been sentenced to death.

6.13 While States parties must be mindful of their obligations to protect the right to life of individuals subject to their jurisdiction when exercising discretion as to whether or not to deport said individuals, the Committee does not consider that the terms of article 6 necessarily require Australia to refrain from deporting an individual to a State which retains capital punishment. The evidence before the Committee reveals that both the judicial and immigration instances seized of the case heard extensive arguments as to whether the author's deportation to the Islamic Republic of Iran would expose him to a real risk of violation of article 6. In the light of these circumstances, and especially bearing in mind the considerations in paragraph 6.12 above, the Committee considers that Australia would not violate the author's rights under article 6 if the decision to deport him is implemented.

6.14 In assessing whether, in the instant case, the author is exposed to a real risk of a violation of article 7, considerations similar to those detailed in paragraph 6.12 above apply. The Committee does not take lightly the possibility that if retried and resentenced in the Islamic Republic of Iran, the author might be exposed to a sentence of between 20 and 74 lashes. But the risk of such treatment must be real, i.e. be the necessary and foreseeable consequence of deportation. According to the information provided by the State party, there is no evidence of any actual intention on the part of the Iranian Government to prosecute the author. On the contrary, the State party has presented detailed information on a number of similar deportation cases in which no prosecution was initiated in the Islamic Republic of Iran. Therefore, the State party's argument that it is extremely unlikely that Iranian citizens who already have served sentences for drug-related sentences abroad would be re-tried and re-sentenced is sufficient to form a basis for the Committee's assessment on the foreseeability of treatment that would violate article 7. Furthermore, treatment of the author contrary to article 7 is unlikely on the basis of precedents of other deportation cases referred to by the State party. These considerations justify the conclusion that the author's deportation to the Islamic Republic of Iran would not expose him to the necessary and foreseeable consequence of treatment contrary to article 7 of the Covenant; accordingly, Australia would not be in violation of article 7 by deporting Mr. J..

6.15 Finally, in respect of the alleged violation of article 14, paragraphs 1 and 3, the Committee has taken note of the State party's contention that its obligation in relation to future violations of human rights by another State only arises in cases involving violations of the most fundamental rights and not in relation of possible violations of due process guarantees. In the Committee's opinion, the author has failed to provide material evidence in substantiation of his claim that if deported, the Iranian judicial authorities would be likely to violate his rights under article 14, paragraphs 1 and 3, and that he would have no opportunity to challenge such violations. In this connection, the Committee notes the information provided by the State party that there is provision for legal representation before the tribunals which would be competent to examine the author's case in the Islamic Republic of Iran, and that there is provision for review of conviction and sentence handed down by these courts by a higher tribunal. The Committee recalls that there is no evidence that Mr. J. would be prosecuted if returned to the Islamic Republic of Iran. It cannot therefore be said that a violation of his rights under article 14, paragraphs 1 and 3, of the Covenant would be the necessary and foreseeable consequence of his deportation to the Islamic Republic of Iran.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal a violation by Australia of any of the provisions of the Covenant.

U. Communication No. 696/1996; Peter Blaine v. Jamaica (Views adopted on 17 July 1997, sixtieth session)*

Submitted by:	Peter Blaine [represented by Allen & Overy, a London law firm]
Victim:	The author
State party:	Jamaica
Date of communication:	3 May 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 1997,

Having concluded its consideration of Communication No. 696/1996 submitted to the Human Rights Committee on behalf of Mr. Peter Blaine under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Peter Blaine, a Jamaican citizen, 27 years of age, currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 7, article 9, paragraph 2, and article 14, paragraphs 1 and 2, subparagraph 3 (a), (b) and (e), and paragraph 5 of the International Covenant on Civil and Political Rights. The author is represented by Allen and Overy, a law firm in London.

Facts as submitted

2.1 On 14 October 1994, the author and his co-defendant Neville Lewis[67] were convicted of the murder of a Mr. Higgs and they were sentenced to death by the Home Circuit Court of Kingston. Their appeal was dismissed by the Court of Appeal of Jamaica on 31 July 1995; the Judicial Committee of the Privy Council denied special leave to appeal on 2 May 1996. With this, it is submitted, available domestic remedies have been exhausted.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

** The text of an individual opinion by Committee member Martin Scheinin is appended to the present document.

[67] Neville Lewis' communication to the Human Rights Committee has been registered as Communication No. 708/1996.

2.2 During the trial, the case for the prosecution was that the author and his co-defendant had been given a lift in the car of the deceased, who had been asking for directions at an intersection on 18 October 1992. The car was next seen on 19 October 1992, driven by the co-defendant and with the author and two other individuals as passengers. The body of the deceased was found on 22 October 1992 in a mud lake, his hands and feet tied with pieces of grey cloth and a piece of grey cloth wrapped around his neck. The forensic pathologist concluded that the cause of death had been ligature strangulation.

2.3 During the trial, the prosecution sought to adduce a caution statement which it claimed was given voluntarily to the police by the author on 21 July 1994. A voir dire was held on the question of the admissibility of the caution statement; the prosecution relied on the evidence of Detective Superintendent Johnson, who was in charge of the investigation into the murder, Superintendent Reginald Grant[68] and Inspector Wright, the arresting officer. During the voir dire, Mr. Johnson testified that the caution statement had been given voluntarily, and that the author had not been coerced by Inspector Wright, nor been offered any inducement prior to his giving the statement. Inspector Wright testified that he was not present in the room when the author made the caution statement, and that he had not assaulted him previously.

2.4 Also during the voir dire, the author's sister testified that she had visited the police station on 21 July 1994, that Inspector W. Grant[69] had told her that her brother did not want to give a statement, that she had told the author that it would be preferable if he gave a statement to the police, and that the author had told her that one of the policemen was giving him "a very hard time". Upon conclusion of the voir dire, the judge rejected defence counsel's submission that the prosecution had failed to establish beyond a reasonable doubt that the author's caution statement was given voluntarily.

2.5 In the author's caution statement, brought as evidence by the prosecution at the trial, it was stated that the author was with his co-accused and the driver in the car, when they picked up two friends of the co-accused. When the car stopped, one of the friends proceeded to rob the driver at gunpoint. Thereafter, they put him in the car trunk, but later they took him out and tied him up. They then took off a strap of a golf bag and put it around Mr. Higgs' neck. Together with one of the friends, the author then drew the strap tight and strangled Mr. Higgs. Later, they dumped him in the mud lake.

2.6 The author's co-defendant gave sworn evidence at the trial, implicating the author as the driving force behind the crime, responsible for the strangulation of the deceased and for his disposal at the Alcan mud lake.

2.7 The author at the trial gave a statement from the dock, to the effect that he was with Mr. Higgs, his co-accused and two other friends in the car, that one of the others took out a knife and held it to Mr. Higgs' neck and that Mr. Higgs ran off pursued by the others. The author stated that he remained at the car and that some time later his co-accused returned, called him a "chicken", and then the two drove off. He stated that this was what he had told the police before.

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[68] Not to be confused with Inspector W. Grant.

[69] Not to be confused with Superintendent Reginald Grant.

Complaint

3.1 The author alleges a violation of articles 7 and 10, paragraph 1, as he was repeatedly beaten by police officers at different police stations over a period of approximately two weeks. In one case, the author was allegedly taken to a room in which six police officers were present. Here the author was kicked in the stomach, beaten on his feet; on another occasion he was beaten unconscious. When requesting medical attention, he was told that he would only be able to see a doctor if he signed several blank sheets of paper. When he refused, he was beaten again; finally, when he could take no more beatings, he signed several blank sheets of paper.

3.2 The author also states that he gave a statement to the police because his sister had told him it would be better.

3.3 The author further submits that articles 7 and 10, paragraph 1, were violated, since he was kept in a small cell together with at least six other occupants for three months between indictment and trial. He allegedly had no other choice but to sleep on newspapers on the floor.

3.4 Counsel states that the author was formally charged with murder on 21 or 22 July 1994, approximately two weeks after having been detained by the police. This is said to constitute a violation of article 9, paragraph 2, and article 14, subparagraph 3 (a), of the Covenant.

3.5 The author complains that his attorney first visited him in the General Penitentiary in Kingston, after about two months. According to the author, the meeting was brief, and after the normal introductions, the lawyer was called away by telephone. The next time the author met with counsel was at the preliminary hearing. He adds that he did not see the lawyer again between the preliminary hearing and the start of the trial. As a result, it is submitted that the author could not prepare his defence adequately and, in particular, was unable to consult with the lawyer as to what evidence or which witness should be called on his behalf. All this is said to constitute a violation of article 14, subparagraph 3 (b).

3.6 The author further submits that he was told by the police what to say during the trial, and that he repeated this when giving his unsworn statement from the dock at trial. He states that he had no opportunity to discuss this with his attorney.

3.7 The author also claims a violation of article 14, subparagraph 3 (e), in that he wanted his lawyer to call as a witness the girl he was living with at the time. For unknown reasons, this witness was not called on his behalf during the trial.

3.8 The author contends that there has been a breach of article 14, paragraphs 1 and 2, as his case was fully and extensively covered by radio, television and all other media prior to the trial. He argues that the media coverage was very prejudicial to his case and must have influenced the jurors. He accordingly submits that the presumption of innocence was not guaranteed; furthermore, because of the adverse publicity he received prior to the trial, the author requested that the press be excluded from the trial, but the request was denied.

3.9 It is submitted that the trial judge's admission into evidence of the caution statement given by the author violated his right to a fair trial within the meaning of article 14, paragraph 1. In this context, the author submits that: (a) he did not give the statement voluntarily; (b) when he gave the statement no justice of the peace was present; (c) he was induced to make a statement by his sister, who in turn was encouraged by several policemen, on the basis that he would be "better off"; and (d) he was arrested on 12 July 1994 but not charged with murder then, although Detective Superintendent Johnson testified on trial that there was sufficient evidence at the time of arrest to charge the author. Counsel points out that it was a breach of the Judges' Rules not to charge the author then; these Rules are strict and do not allow the police to delay charging an accused in order to improve their evidence. It is said that this strengthens the defence's case that the statement was involuntarily made.

3.10 Counsel further argues that the trial judge had a duty to give reasons for his ruling that the caution statement was admissible evidence, and that such reasons as the judge in fact gave were inadequate to discharge that duty. Counsel also submits that the prosecution failed to discharge the burden of proof to show beyond a reasonable doubt that the statement was given voluntarily. In this context, counsel complains that while Inspector Wright was called to give evidence on the voir dire, Inspector Grant was not.

3.11 The author also alleges a violation of article 14 in respect of the hearing of his appeal. He claims that he gave sworn evidence at the voir dire but that the trial transcript fails to record this, giving the impression that he never gave sworn evidence. Accordingly, it is argued that the author was deprived of his right that his representative pursue his appeal and that the Court hear the appeal on the basis of a complete report of all evidence and submissions given on trial.

3.12 It is stated that the matter has not been submitted to another instance of international investigation or settlement.

State party's submission and counsel's comments

4.1 By submission of 12 July 1996, the State party addresses the question of admissibility of the communication as well as the question of the merits of the communication, in order to expedite the procedure.

4.2 Concerning the author's claim that he was beaten up after his arrest, the State party denies that the Covenant was breached. It refers to the voir dire held during the trial, after which the judge found no evidence that the statement was not voluntary, and notes that the author has produced no further evidence in support of this allegation.

4.3 As regards the author's claim that his caution statement was arbitrarily admitted into evidence by the judge, the State party submits that this is a matter of facts and evidence, which should be left to appellate courts according to the Committee's jurisprudence. The State party points out that the Court of Appeal examined the matter and found no errors.

4.4 As regards the author's claim that the prosecution failed to call Inspector Grant as a witness during the voir dire, the State party submits that this does not constitute a breach of the Covenant. The State party argues that the defence could have exercised its right to have the witness made available to them when it became clear that the prosecution was not going to call him.

4.5 With regard to the author's contention that he gave sworn evidence at the voir dire but that this was not recorded and that this resulted in a violation of his right to appeal, the State party states that it will investigate the matter, but adds that, owing to the unusual nature of the allegation, it would welcome a more precise account of the circumstances of the failure to record the evidence.

4.6 Moreover, the State party does not necessarily accept that if the evidence was indeed omitted from the trial transcript, it constituted a violation of the author's right to appeal. It argues that such a breach would only occur if the evidence omitted was such that if it had been available to the Court of Appeal, the case would have been decided differently.

4.7 With regard to the author's complaint about the media coverage, the State party notes that the matter was not raised before the domestic courts and that this part of the communication is thus inadmissible for non-exhaustion of domestic remedies.

4.8 As regards the author's complaints about the lawyer who represented him at trial, the State party argues that it cannot be held responsible for the manner in which a lawyer conducts a case, whether he is privately retained or appointed by the State.

5.1 In reply to the State party's submission, counsel states that it is difficult for a victim of torture or cruel, inhuman or degrading treatment to substantiate his allegations, for fear of reprisal and for lack of witnesses, and because the police will collectively defend itself since its reputation as a whole is at stake. Counsel draws the Committee's attention to the following factors pointing to corroboration of the author's claim that he was beaten by the police before being charged: he had been in custody for two weeks; at the voir dire Inspector Grant was not called; his sister gave evidence that Inspector Grant had told her it would be better for the author if he made a statement; and there was conflicting evidence as to when the applicant was formally charged, on 21 or 22 July 1994, that is, the day of the caution statement or the day after. It is also submitted that Inspector Wright had given incomplete evidence at the voir dire saying that he had charged the author on 22 July, whereas before the jury he said that while he had executed the warrant on 22 July, he had verbally charged the author on 21 July. Counsel moreover recalls that it is accepted jurisprudence that the Committee can form its view on the basis of facts that have not been contradicted by the State party.

5.2 Counsel argues that the failure to call Inspector Grant as a witness was a fundamental flaw in the fairness of the criminal proceedings against the author.

5.3 Counsel does not provide any further information concerning the author's claim that his sworn evidence given at the voir dire was not recorded, but contends that the Court of Appeal might well have come to a different conclusion on the voluntariness of the caution statement if it had had access to the author's evidence. Counsel contends that the test in this case should be whether the omission gave rise to the possibility that his trial was not fair.

5.4 Counsel argues that where a fundamental right is infringed and the possibility exists that a person's right will be taken in consequence, the Committee should assume jurisdiction to consider whether or not the caution statement was rightly admitted.

5.5 As regards the State party's argument that the author failed to exhaust domestic remedies with regard to the pre-trial publicity, counsel states that he does not know of any reported Jamaican case where the courts stayed proceedings because of adverse publicity. Counsel argues that no effective remedy was available after the trial judge refused the author's application to exclude the press from the court.

5.6 As regards the preparation of the defence, counsel notes that the legal aid given by the State party is at such a meagre level that it is most often inexperienced counsel who take death row cases and that because of the level of remuneration counsel will almost inevitably reduce the time he spends in preparation of the case. Counsel further notes that the State party has failed to ascertain what exactly was the position with counsel for the author.

Decision on admissibility and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, subparagraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the State party has argued that the author's claim that the media coverage prejudiced the jury against him is inadmissible for non-exhaustion of domestic remedies. The Committee notes that the matter was not raised by the author or his counsel during the trial. The Committee considers therefore that this part of the communication is inadmissible.

6.4 As regards the author's claim that he only saw his lawyer briefly once before the preliminary enquiry and that he had no time to prepare his defence properly, the Committee notes that neither the author nor his counsel requested more time for the preparation of the defence at the beginning of the trial. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

6.5 As regards the author's claim that his lawyer failed to call his girlfriend as a witness at the trial, the Committee considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using his best judgement and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the author's claim that the admission of his caution statement into evidence by the judge was in violation of article 14, paragraph 1, since the prosecution had not shown that the statement was given voluntarily, the Committee notes that this claim pertains to the evaluation of facts and evidence by the judge. The Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee but for the appellate courts of States parties to review the evaluation of facts and evidence. The material before the Committee does not show that the trial judge's decision was arbitrary or amounted to a denial of justice. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.7 As regards the author's claim that he gave sworn evidence during the voir dire, but that this was not recorded, the Committee notes that the State party has offered to investigate the claim but has requested more specific information as to the circumstances. The Committee rejects the State party's affirmation that it is for the author or his counsel to provide additional information and regrets the lack of information about the results, if any, of the investigation promised by the State party. However, the Committee notes that the trial transcript reveals that there appears to have been a comprehensive voir dire. It remains unclear to the Committee whether any part of it could have been suppressed. In the circumstances, the Committee considers that neither the author nor his counsel have sufficiently substantiated their claim, and this part of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

6.8 The Committee notes that the State party has forwarded comments on the merits of the communication so as to expedite the procedure. Counsel has not raised any objection to the examination of the merits at this stage.

7. Accordingly, the Committee declares the author's remaining claims admissible and proceeds, without further delay, to an examination of the substance of those claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The author has claimed that he was not formally charged until after two weeks after his arrest, although the police testified at trial that there was enough evidence on the basis of which he could have been charged. The Committee observes that it appears from the trial transcript that, during cross-examination, Superintendent Johnson testified that the author was not charged before 21 July because the witnesses did not know his correct name and therefore an identification parade was held on 21 July 1994 to allow for the author's identification by the witnesses. After the witnesses had identified the author, he was formally charged. In the circumstances, the Committee finds that the facts before it do not disclose a violation of article 9, paragraph 2, and article 14, subparagraph 3 (a).

8.2 As regards the author's claim that he was beaten in order to make him sign a confession, the Committee notes that this claim was put before the judge and the jury at trial, who rejected it. The Committee further notes that the author, in his statement from the dock during the trial, did not make any allusion to having been beaten by the police. Although the matter was raised on appeal, counsel did not pursue it and the Court found no merit in it. The Committee concludes that the information before it does not justify the finding of a violation of articles 7 and 10 of the Covenant.

8.3 As regards the author's claim that the failure of the prosecution to call Inspector Grant as a witness violated the author's right to a fair trial, the Committee notes that if Inspector Grant's evidence were important to the accused, his counsel could have requested the judge to have him called. It appears from the trial transcript that counsel failed to do so. In the circumstances, the facts before the Committee do not disclose a violation of article 14, paragraph 1 or subparagraph 3 (e).

8.4 The State party has not contested the author's claim that he was kept in a small cell together with six other occupants for three months between indictment and trial, and that he had to sleep on newspapers on the floor. In the absence of a reply from the State party, the Committee finds that the conditions of pre-trial detention as described by the author amount to a violation of article 10, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 10, paragraph 1, of the Covenant.

10. Pursuant to article 2, subparagraph 3 (a), of the Covenant, the author is entitled to an effective remedy, entailing compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

APPENDIX

Individual opinion by Committee member Martin Scheinin (*dissenting*)

[Original: English]

I disagree with the Committee's decision to deal jointly with admissibility and merits in the present case. It is true that the State party did address both issues in its submission of 12 July 1996 and that counsel of the applicant in substance commented also on the merits. Nevertheless, counsel of the applicant was never explicitly invited to comment on the merits of the case. On the basis of the text of the Optional Protocol and the publicly available version of the Committee's rules of procedure counsel had reason to expect that there would be another opportunity to deal with the merits of the case.

These concerns are aggravated by the fact that the case involves capital punishment and that the State party has not answered to the author's complaint formally presented under article 9, paragraph 2, of the Covenant but raising issues under paragraph 3 of the said article. If the issue of whether and when the author was brought before a judicial authority after his detention by the police "on or about 12 July 1994" had been clarified through declaring the case admissible and inviting new submissions from the parties, more light could also have been shed on the author's allegations relating to articles 7 and 10.

V. Communication No. 702/1996; Clifford McLawrence v. Jamaica (Views adopted on 18 July 1997, sixtieth session)[*]

Submitted by: Clifford McLawrence

Victim: The author

State party: Jamaica

Date of communication: 26 April 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1997,

Having concluded its consideration of Communication No. 702/1996 submitted to the Human Rights Committee by Mr. Clifford McLawrence under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Clifford McLawrence, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Spanish Town, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7 and 9, paragraphs 1 to 4, article 10, paragraphs 1 and 2, article 14, paragraph 1, subparagraphs 3 (a), (b), (c), (d) and (e) and paragraph 5 and article 17 of the International Covenant on Civil and Political Rights. Initially, the author was represented by counsel. After submitting his initial communication on 26 April 1996, the author discharged the London-based law firm which had initially agreed to represent him; another London-based law firm agreed to take over his representation, but the author subsequently also discharged that firm.

Facts as submitted

2.1 The author was charged with the murder of Hope Reid on 8 July 1991 in the Parish of St. Andrews. He was tried in the Home Circuit Court in Kingston, Jamaica, from 9 to 25 November 1992, found guilty as charged and sentenced to death on 25 November 1992. Under the Offenses against the Person (Amendment) Act of 1992, the author is classified as a capital offender. He applied for leave to appeal on 30 November 1992; the Court of Appeal of Jamaica heard his appeal from 14 to 17 March 1995 and dismissed it on 26 June 1995. The author then filed a petition for special leave to appeal with the Judicial Committee of the Privy Council; the Judicial Committee heard the petition on 28 March 1996 and dismissed it without giving reasons. With this, it is submitted, available domestic remedies are exhausted.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

2.2 Ms. Reid, a 36-year-old banker, was strangled by an electrical cord during the night of 7 to 8 July 1991; she was found by her maid shortly before 7 a.m. on 8 July. Her husband and children were abroad at the time. A television set and video had disappeared from the house; the family car had also been stolen when her body was found.

2.3 During the trial, the prosecution relied primarily on three sources of evidence: (a) the evidence of two individuals who had been found in possession of the stolen goods from the victim's house and who claimed that they had received them from the author - the two were separately charged with receiving stolen goods, but charges were dropped in return for their testifying for the prosecution during the trial; (b) a confession statement which allegedly had been given and signed by Mr. McLawrence; and (c) fingerprint evidence which allegedly had been taken from a surge protector in the victim's home and which allegedly matched the author's fingerprints. The case for the defence was that the author had made no confession statement, nor any statement whatsoever; rather, the defence argued, the confession statement was likely to have been made by another individual, one Horace Beckford, who had been arrested by the police on the day following the murder but had been released without charge.

2.4 The author complains that by failing to give his legal representative an opportunity to cross-examine Horace Beckford or to put the earlier statement Beckford made into evidence, a crucial part of the defence's case was removed. Furthermore, although he consistently denied having made a confession statement, it was clear from the jury's guilty verdict, reached after only seven minutes of deliberations, that they believed that the statement was his own. Since the author claims to have been subjected to police violence at the time the statement was supposed to have been made, he submits that the trial judge should have considered the voluntary nature of the confession and ruled on its admissibility. In addition, he argues that two potential alibi witnesses were not called to give evidence.

2.5 For the appeal, author's counsel filed numerous grounds of appeal. The most important ones, invoked by the author himself in his written communications to the Committee, were that the trial judge had been wrong that the authenticity of the (alleged) signed confession statement was a question of fact for the jury. Counsel contended that since Mr. McLawrence claimed that he was subjected to police beatings at the time when the statement was made according to the prosecution, the question of voluntariness was a live issue to be determined by the judge. Furthermore, counsel claimed that the judge did not warn the jury of the dangers in making comparisons of fingerprint evidence in the light of the incomplete nature of this evidence.

2.6 The Court of Appeal dismissed the appeal on the basis that the trial judge was not wrong in terminating a voir dire called to consider the voluntariness of the alleged confession statement since the accused had clearly indicated that he had never made a statement and that, therefore, the question of voluntariness did not arise and the question of authenticity of the statement was an issue of fact for the jury to decide. It also considered that the judge gave correct directions to the jury on how they were to treat fingerprint evidence.

2.7 Finally, before the Judicial Committee of the Privy Council, the principal grounds of appeal were that the trial judge had been wrong to terminate the voir dire that had been called and that he should have made a ruling on the admissibility of the author's alleged confession. Without giving reasons, the Privy Council dismissed the appeal.

Complaint

3.1 The author alleges a violation of article 7 of the Covenant because of the length of his detention on death row, since 25 November 1992, adducing, inter alia, the "appalling conditions suffered by detainees in the death row section of St. Catherine District Prison". He invokes judgements of the Judicial Committee of the Privy Council[70] and of the Supreme Court of Zimbabwe[71] in support of his argument.

3.2 The author claims a violation of article 9, paragraph 1, because when he was arrested the three principal sources of evidence relied upon by the prosecution during the trial were not yet available to it: accordingly, the arrest must be considered arbitrary. He further contends that article 9, paragraph 2, was breached, since he was given no reasons for his arrest and was not cautioned. He further contends that the first time he was apprised of the reasons for his arrest was approximately three weeks after the arrest, when being taken to the preliminary hearing.[72]

3.3 It is submitted that Clifford McLawrence is a victim of violations of article 9, paragraphs 3 and 4, because of the delays in bringing him before a judge or judicial officer. In this context, the author provides the following chronology:

- On Saturday, 13 July 1991, the day of his arrest, the author was taken immediately to Constance Spring Police Station, where he was held for 45 to 60 minutes;

- On the same day, he was taken to the remand centre at Rema: according to him, the police took the decision to send him to Rema on its own, without consulting a judge;

- On Tuesday, 16 July 1991, he was taken from the remand centre to the Central Police Station in Kingston. He was held there for one day, during which he was questioned about a murder;

- Thereafter, the author was returned to the remand centre at Rema, where he was detained for several weeks. He first appeared before a judge on 20 July 1991; on the third court appearance (the author does not remember the exact date), the judge ordered him transferred to the General Penitentiary.

3.4 The author contends that he was not informed at any time after his arrest of his right to legal representation or to apply for a writ of habeas corpus.

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[70] Earl Pratt and Ivan Morgan v. Attorney General of Jamaica and Another, judgment of 2 November 1993.

[71] Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General for Zimbabwe et al., Supreme Court of Zimbabwe, judgment of 24 June 1993.

[72] The latter argument was filed in a supplementary submission of 25 September 1996.

3.5 The author alleges violations of articles 7 and 10, paragraph 1, since, after being brought to the Constance Spring Police Station, he was handcuffed to the side of an iron chair and subjected to blows to the head, body and soles of his feet with an iron bar, a sheet of aluminium metal and a large book. As a result, his feet swelled up and he could not walk properly or put on shoes. He claims that police officers applied electric shocks to his testicles and other parts of the body, and that he was subject to verbal abuse and harassment, with some officers threatening to shoot him.

3.6 According to the author, the proceedings before the Home Circuit Court were contrary to article 14, paragraph 1, in that despite repeated and continued attempts to locate Horace Beckford, considered to be a crucial witness, the latter was unavailable to attend trial. In his absence, author's counsel was prevented by the judge from submitting documentary evidence to prove that Mr. Beckford had himself been arrested shortly before the author himself. It is submitted that, given the absence of this crucial witness, Mr. McLawrence could not have a fair trial.

3.7 As to alleged breach of article 14, subparagraph 3 (a), the author indicates that he was never formally apprised of the charges against him: he first learned about the reasons for the arrest when he was taken to the first preliminary hearing. He also contends that he did not know that the men who apprehended him were policemen until he reached the police station. He contends that he did not have access to a lawyer at any of his preliminary appearances in court, that is, approximately 15 times before the start of his trial. The nature of these court visits was to set a trial date and to keep him on remand. It was only shortly prior to the commencement of the trial that he was given access to a lawyer, and therefore this lawyer had no time to prepare the defence.[73] Allegedly, the lawyer only visited him after the start of the trial, on the second-to-last day of the second week of the trial, after the author had already given evidence; moreover, the duration of the visit was only 10 minutes. This is said to be in violation of article 14, subparagraph 3 (b). Similarly, the author claims that the fact that two alibi witnesses he relied on as evidence, namely his girlfriend and a friend, were not called to testify, amounts to a violation of article 14, subparagraph 3 (e).

3.8 The author contends that he did not see a lawyer again after his conviction. He was not, for example, able to consult with counsel about the appeal process and, although he had expressly stated on the appeal form that he wished to be present during the hearing of the appeal, was not informed of the date on which the appeal was heard. He allegedly learned of the appeal's dismissal from the press. This is said to constitute a violation of article 14, subparagraphs 3 (d) and paragraph 5.

3.9 According to the author, the length of his pre-trial detention - 16 months - and the delay of almost 31 months between his conviction and the dismissal of his appeal constitute a violation of his right to be tried without undue delay, article 14, subparagraph 3 (c).

3.10 Finally, the author claims a violation of article 17, paragraph 1, of the Covenant, since his correspondence was repeatedly and unlawfully interfered with by prison guards, and letters sent to the prison office by him did not reach their addressees.

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[73] This claim submitted by author's counsel does not tally with one of the author's handwritten letters to the Committee, in which he concedes that his lawyer, a Queen's Counsel, represented him well on trial.

State party's information and observations

4.1 In its submission of 15 July 1996, the State party does not object to the admissibility of the communication and offers comments on the merits of the author's allegations.

4.2 The State party rejects the contention that a period of detention of three and a half years on death row constitutes a violation of article 7 of the Covenant. It notes that the threshold set by the Judicial Committee of the Privy Council in the Pratt and Morgan judgement of 2 November 1993 and denies that there are any exceptional circumstances which would make the five-year limit inapplicable.

4.3 The State party denies that there has been a breach of article 9, paragraph 1, on the basis that Mr. McLawrence's arrest was without grounds or that he was arrested on grounds which were never disclosed to him. It submits that, in order to effect an arrest, "there needs to be enough evidence to reasonably show that the person may have committed the offence. The fact that other evidence later became available and could be relied upon by the prosecution at trial does not mean that the original arrest was baseless". Furthermore, the State party indicates that, as far as the alleged breach of article 9, paragraph 2, is concerned, the author should provide evidence that he had no idea of the reasons for his arrest.

4.4 As to the alleged breaches of article 9, paragraphs 3 and 4, and article 14, subparagraph 3 (c), the State party rejects the assertion that the 16-month delay between arrest and trial constituted undue delay, as a preliminary hearing was held during that time. Furthermore, while the 31-month delay between conviction and the judgement of the Court of Appeal was "somewhat longer than is desirable", this did not result in substantial injustice to the author.

4.5 The State party emphatically rejects the allegation that article 10, paragraph 1, was breached because the author was beaten upon his arrest and forced to sign a confession statement. Firstly, there is no medical evidence or any other evidence to support this allegation. Secondly, this matter was extensively examined both during the trial and on appeal, where the author's assertions were rejected. Since this matter has been fully evaluated by the Jamaican courts, and given that there is no evidence in support of the author's assertions, the State party contends that it is inappropriate for the Committee to reopen this issue.

4.6 As regards the alleged violation of article 14, paragraph 1, the State party notes that even the author's representative concedes that strenuous but unsuccessful efforts were made to locate Horace Beckford, a witness considered crucial. That this witness could not give evidence and that the defence could not challenge his credibility do not amount to circumstances which breached the author's right to a fair trial. Furthermore, "in the absence of detailed information", the State party rejects that there has been a violation of article 14, subparagraph 3 (b).

4.7 The State party categorically denies that the author was not informed of his right to legal representation during his first and second court appearances. As to his presence at the hearing of the appeal, the State party notes that the convicted person is generally not present during the appeal hearing. Furthermore, the Registrar of the Court of Appeal regularly dispatches notices about the date of the hearing of an appeal to all appellants: the State party contends that the author did receive this notice and thus was aware of the date of his appeal.

4.8 Concerning the violation of article 14, subparagraph 3 (e), because two potential alibi witnesses for the author were not called during the trial, the State party notes that this breach cannot be attributed to it, without clear evidence that the State party somehow obstructed the attendance of these witnesses at a trial.

4.9 The State party denies a breach of article 14, paragraph 5, since several grounds of appeal were filed on Mr. McLawrence's behalf and the appeal was in fact heard over a full three-day period by the Court of Appeal.

4.10 Finally, the State party notes that the author's blanket assertion that his mail was interfered with by prison guards is not enough to support a finding of a violation of article 17. Indeed, that letters mailed from the prison may not have reached their intended destination could well be attributed to factors other than deliberate interference with correspondence.

Examination of the merits

5.1 The Committee notes that the State party, in its submission of 15 July 1996, does not contest the admissibility of the communication. It has examined whether the communication meets all the admissibility requirements under the Optional Protocol. In respect of the author's complaint that the prison authorities arbitrarily interfered with his correspondence, in violation of article 17 of the Covenant, the Committee considers that the author has failed to substantiate his claim, for purposes of admissibility. This aspect of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

5.2 As to the other claims of the author, the Committee concludes that they are admissible and therefore proceeds directly with the examination of the merits of these claims. It has examined the present communication in the light of all the information made available by the author, his former counsel and the State party, as provided for under article 5, paragraph 1, of the Optional Protocol.

5.3 The author has alleged a violation of article 7, on account of his prolonged detention on death row, which at the time of submission of the communication was three years and five months. The Committee reiterates that prolonged detention on death row does not per se amount to a violation of article 7 of the Covenant in the absence of further compelling circumstances. No such further circumstances, over and above the length of detention, are discernible in the instant case; accordingly, there has been no violation of article 7 on this count.

5.4 The author complains about beatings and treatment in violation of articles 7 and 10, paragraph 1, at the hand of police officers following his arrest; the State party has rejected this allegation. The Committee notes that the incidents invoked by the author were considered in detail by the court of first instance and the Court of Appeal. No material has been produced to show that the evaluation of the evidence by these instances was arbitrary or amounted to a denial of justice. The Committee therefore finds no violation of articles 7 and 10, paragraph 1.

5.5 As to the claim that article 9, paragraph 1, was breached because the author's arrest warrant did not feature the three principal sources of evidence later relied upon by the prosecution, the Committee recalls that the principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation. There is no indication, in the instant case, that Mr. McLawrence was arrested on grounds not established by law. He has argued, however, that he was not promptly informed of the reasons for his arrest, in violation of article 9, paragraph 2. The State party has refuted this claim in general terms, in that the author must show that he did not know the reasons for his arrest; it is, however, not sufficient for the State party simply to reject the author's allegations as unsubstantiated or untrue. In the absence of any State party information to the effect that the author was promptly informed of the reasons for his arrest, the Committee must rely on Mr. McLawrence's statement that he was only apprised of the charges for his arrest when he was first taken to the preliminary hearing, which was almost three weeks after the arrest. This delay is incompatible with article 9, paragraph 2.

5.6 Concerning the alleged violation of article 9, paragraph 3, it is apparent that the author was first brought before a judge or other officer authorized to exercise judicial power on 20 July 1991, i.e. one week after being taken into custody. The State party has not addressed the allegations under article 9, paragraphs 3 and 4, but rather situated them in the context of delays in the trial process. While the meaning of the term "promptly" in article 9, paragraph 3, must be determined on a case-by-case basis, the Committee recalls its General Comment on article 9[74] and its jurisprudence under the Optional Protocol, pursuant to which delays should not exceed a few days.[75] A delay of one week in a capital case cannot be deemed compatible with article 9, paragraph 3. In the same context, the Committee considers that pre-trial detention of over 16 months in the author's case constitutes, in the absence of satisfactory explanations from the State party or other justification discernible from the file, a violation of his right, under article 9, paragraph 3, to be tried "within reasonable time" or to be released.

5.7 With respect to the alleged violation of article 9, paragraph 4, it is uncontested that the author did not himself apply for habeas corpus. He further claims that he was never informed of this entitlement, and that he had no access to legal representation during the preliminary enquiry. The State party categorically maintains that he was informed of his right to legal representation on the occasion of his first court appearances. On the basis of the material before it, the Committee considers that the author could have requested a review of the lawfulness of his detention when he was taken to the preliminary hearing in his case, where he was informed of the reasons for his arrest. It cannot, therefore, be concluded that Mr. McLawrence was denied the opportunity to have the lawfulness of his detention reviewed in court without delay.

5.8 The author has claimed a violation of article 14, paragraph 1, since a witness deemed to be crucial, Horace Beckford, was unavailable at trial, and because the judge failed to make a ruling on the voluntariness of the alleged confession statement and gave inadequate directions on the admissibility of fingerprint evidence. The right to a fair trial before an independent and impartial tribunal does not encompass an absolute right to have a certain witness testify in court on trial; it may not necessarily amount to a violation of due process if all possible steps are taken, unsuccessfully, to secure the presence of a witness in court, though this may depend on the nature of the evidence. In the instant case, counsel concedes that "repeated efforts" were made to secure the attendance of Horace Beckford. As to the issue of the voluntariness of the alleged confession statement and the admissibility of fingerprint evidence, the Committee recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate all the facts and evidence in a given case. It is not for the Committee to question the evaluation of such evidence by the courts unless it can be ascertained that the evaluation was arbitrary or otherwise amounted to a denial of justice; neither is discernible in the present case. The Committee does not consider that the author has established a violation of article 14, paragraph 1.

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[74] General Comment 8 [16] of 27 July 1982, para. 2.

[75] See Views on Communication No. 373/1989 (Lennon Stephens v. Jamaica), adopted 18 October 1995, para. 9.6.

5.9 Article 14, subparagraph 3 (a), of the Covenant gives the right to everyone charged with a criminal offence to be informed "promptly and in detail ... of the charge against him". Mr. McLawrence contends that he was never formally informed of the charges against him and that he first knew of the reasons for his arrest when he was taken to the preliminary hearing. The Committee notes that the duty to inform the accused under article 14, subparagraph 3 (a), is more precise than that for arrested persons under article 9, paragraph 2. So long as article 9, paragraph 3, is complied with, the details of the nature and cause of the charge need not necessarily be provided to an accused person immediately upon arrest. On the basis of the information before it, the Committee concludes that there has been no violation of article 14, subparagraph 3 (a).

5.10 The right of an accused person to have adequate time and facilities for the preparation of his defence is an important aspect of the guarantee of a fair trial and an important aspect of the principle of equality of arms. Where a capital sentence may be pronounced on the accused, sufficient time must be granted to the accused and his counsel to prepare the trial defence. The determination of what constitutes adequate time requires an assessment of the individual circumstances of each case. The author also contends that he was unable to obtain the attendance of two potential alibi witnesses. The Committee notes, however, that the material before it does not reveal that either counsel or the author complained to the trial judge that the time for the preparation of the defence had been inadequate. If counsel or the author felt that they were inadequately prepared, it was incumbent upon them to request an adjournment. Furthermore, there are inconsistencies in the author's own version of this issue: whereas, in communications to his representative before the Committee, he claims that his trial lawyer had no time to prepare the defence, he argues, in a letter to the Committee dated 1 October 1996, that his representation on trial had been "excellent". Finally, there is no indication that counsel's decision not to call two potential alibi witnesses was not based on the exercise of his professional judgement or that, if a request to call the two witnesses to testify had been made, the judge would have disallowed it. Accordingly, there is no basis for finding a violation of article 14, subparagraphs 3 (b) and (e).

5.11 The author has claimed violations of article 14, paragraphs 3 (c) and 5, on account of "undue delays" of the criminal proceedings in his case. The Committee notes that the State party itself admits that a delay of 31 months between trial and dismissal of the appeal is "longer than is desirable", but does not otherwise justify this delay. In the circumstances, the Committee concludes that a delay of 31 months between conviction and appeal constitutes a violation of the author's right, under article 14, subparagraph 3 (c), to have his proceedings conducted without undue delay. The Committee observes that in the absence of any State party justification, this finding would be made in similar circumstances in other cases.

5.12 Concerning the adequacy of the author's legal representation, on trial and on appeal, the Committee recalls that legal representation must be made available to individuals facing a capital sentence. In the present case, it is uncontested that Mr. McLawrence was unrepresented during his initial court appearances, although the State party maintains that he was informed of his right to legal assistance on those occasions. On the other hand, he did secure legal representation thereafter, and on his own admission was represented satisfactorily during the trial. Concerning the appeal, the Committee notes that the appeal form dated 30 November 1992 indicates that the author did not wish the Court of Appeal to assign him legal aid, that he had the means of securing legal representation for himself and that he gave the names of the two lawyers who had represented him on trial. The author did initially indicate the desire to be present during the hearing of the appeal. However, he was represented at the appeal hearing, and it is not clear from the material before the Committee whether the author continued to insist, in March 1995, to be present during the hearing of the appeal. In the circumstances of the case, the Committee is not in a position to make any finding on article 14, subparagraph 3 (d).

5.13 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 [16], the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal". In this case, since the final sentence of death was passed without due respect for the requirements of article 14, the Committee must hold that there has also been a violation of article 6 of the Covenant.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraphs 2 and 3, and article 14, subparagraph 3 (c), and consequently of article 6, of the Covenant.

7. The Committee is of the view that Mr. McLawrence is entitled, under article 2, subparagraph 3 (a), of the Covenant, to an effective remedy, entailing commutation of the death sentence.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

W. Communication No. 707/1996; Patrick Taylor v. Jamaica (Views adopted on 14 July 1997, sixtieth session)*

Submitted by: Patrick Taylor [represented by Herbert Smith, a London law firm]

Victim: The author

State party: Jamaica

Date of communication: 14 June 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1997,

Having concluded its consideration of Communication No. 707/1996 submitted to the Human Rights Committee on behalf of Mr. Patrick Taylor under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication is Patrick Taylor, a Jamaican citizen, mechanic and taxi driver, currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 2, paragraph 3; articles 6, 7 and 9, paragraphs 2 and 3; article 10, paragraph 1; and article 14, subparagraphs 3 (b), (c) and (d), of the International Covenant on Civil and Political Rights. He is represented by counsel, Ms. Paula Hodges of Herbert Smith, a law firm in London.

Facts as presented by the author

2.1 The author was convicted, together with his two co-defendants, his brother Desmond Taylor and Steve Shaw,[76] for the murder of the Peddlar family, and

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[**] The text of an individual opinion by Committee member Nisuke Ando is appended to the present document.

[76] Steve Shaw's and Desmond Taylor's Communications to the Human Rights Committee have been registered as Communications Nos. 704/1996 and 705/1996, respectively.

sentenced to death, for four counts of non-capital murder[77] on 25 July 1994 by St. James Circuit Court, Montego Bay, Jamaica. The judge ruled that as the murders were committed on the same occasion the author was guilty of capital murder. His appeal was dismissed by the Court of Appeal of Jamaica on 24 July 1995. On 6 June 1996, the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed.

2.2 On 27 March 1992, the decomposing bodies of Horrett Peddlar, his wife, Maria Wright and their two sons, Matthew and Useph, were found. They had been "chopped to death" with blows to the head, body and limbs.

2.3 On the same day, the author, his brother, Desmond, and several other members of the Taylor family were taken in for questioning, all except the author being allowed to leave during the course of the day. The author, however, was kept in custody at the Barrnet police station, in Montego Bay, until 21 April 1992. They were questioned because of the animosity between the Peddlar and the Taylor families. Desmond was a judgement debtor of Mr. Peddlar and both Taylors had been charged with having assaulted him; the criminal proceedings were still pending. The author was re-arrested on 4 May 1992.

2.4 As there were no eyewitnesses, the case for the prosecution was based on the statement allegedly made by the author while in police custody on 4 May. The author was confronted with his co-accused, Steve Shaw, in the presence of a police officer. Shaw had said to the author "Me did down a Junie Lawn when me see Mark (Patrick Taylor is also known as Mark), Boxer (Desmond) and President came dey. When me see Mark, President and Boxer. Me and Mark go up a de gate and watch Boxer and President go up a de yard and chop up the people dem." Patrick was then alleged to have said "Curly" (a name by which Shaw is known), and was said to have begun to cry, and said "Boxer no tell you no fi say nothing. Alright sir. Me go up dey but me never know say dem serious dem go kill de people dem."

2.5 The case for the defence was that apart from the confrontation between the author and the co-accused, Shaw, there was no evidence against the author, or that he had done anything other than be present near the land on which the murders had been committed. The author denied the police version. He made a statement from the dock denying any involvement in the killings, and denied having gone to the Peddlar home.

2.6 It is stated by counsel that, in practice, constitutional remedies are not available to the author because he is indigent and Jamaica does not make legal aid available for constitutional motions. Reference is made to the Human Rights Committee's jurisprudence.[78] Counsel submits therefore that all domestic remedies have been exhausted for purposes of article 5, subparagraph 2 (b), of the Optional Protocol.

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[77] The judge, when sentencing the author, stated: "Mr. Taylor, you have been convicted of non-capital murder, but because of the fact that several murders were committed on the same occasion, it means that you are sentenced to suffer death in the manner authorized by law".

[78] Communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica), Views adopted on 18 July 1994.

Complaint

3.1 Counsel contends that the State party's failure to provide legal aid for constitutional motions constitutes a violation of article 2, paragraph 3, of the Covenant in connection with article 14, paragraph 1, because it has not ensured an effective domestic remedy in the determination of the author's rights. According to counsel the proceedings in the constitutional court must conform with the requirements of a fair hearing in accordance with the conditions spelled out in article 14, paragraph 1, encompassing the right to legal aid.

3.2 The author alleges a violation of article 9, paragraphs 2 and 3, of the Covenant, on the ground that he was arrested on 27 March 1992 and held in custody for a period of 26 days, with no charges being brought against him in that time. The author was re-arrested on 4 May 1992 and it was not till 7 May 1992 that he was informed that he had been charged with murder and was cautioned. It is submitted that he was detained ~~for~~ 29 days before being formally cautioned or having access to a lawyer. Counsel adds that the author was neither promptly charged within the meaning of article 9, paragraph 2, nor brought promptly before a judicial officer within the meaning of article 9, paragraph 3. Reference is made to the Committee's jurisprudence[79] where it was held that detention must not exceed a few days.

3.3 The author submits that his rights under article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant were violated in that he was not promptly brought to trial. In this respect, counsel alleges that two years and four months from the date of the initial arrest, 27 March 1992 until the trial, on 18 July 1994, is excessive as the issues involved were not complicated, notwithstanding that four murders were involved.

3.4 Counsel further submits that the author is the victim of a violation of article 14, subparagraphs 3 (b) and (d), as the author was not represented by a lawyer at all until after his first appearance before a judge. Subsequently, he was only able to consult with his lawyer for 8 to 10 minutes. In the period leading up to the trial, though the author saw his privately retained counsel (QC Hamilton) on several occasions, it was always for very short periods of time, and at no stage did the lawyer seek the author's comments on the prosecution's evidence. The author had requested that a witness be called, but the lawyer failed to do so. The author's lawyer was not in court on the day the author was convicted.[80]

3.5 Counsel further contends that the fairness of the proceedings was flawed by reason of the fact that the author and his brother received joint representation. The evidence of the case was totally different for both brothers as the evidence against the author was that he was merely present, whereas his brother was an active participant. There was an evident conflict of interest in the two defences. Counsel thus argues that the State party failed to provide adequate representation to the author within the meaning of article 14, subparagraphs 3 (b) and (d).

3.6 Counsel submits that an execution that might have been lawful if carried out immediately and without exposing the convicted man to the aggravated punishment of inhuman treatment during a long period can become unlawful if the proposed execution is to come at the end of a substantial period under intolerable conditions. In this respect, counsel refers to Pratt and Morgan as an authority for the proposition that carrying out a sentence of death can be rendered unlawful where the subsequent conditions in which a condemned man is held, either in terms of time or in terms of physical discomfort, constitute inhuman and degrading treatment or punishment. Counsel contends that such an approach is consistent with the structure of the Covenant, which shows that detention may be unlawful if it is either unduly prolonged or the physical conditions fall below recognized minimum standards. The author was sentenced to death, not to death preceded by a substantial period of inhuman treatment. Counsel claims that the author's execution would be unconstitutional and in violation of articles 7 and 10, paragraph 1, of the Covenant.

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[79] See Communication No. 336/1988 (Filastre v. Bolivia), Views adopted 5 November 1991, paragraph 6.4, and General Comment No. 8.

[80] This allegation is not corroborated by the trial transcript.

3.7 Counsel submits that the conditions at St. Catherine District Prison amount to a violation of the author's rights under articles 7 and 10, paragraph 1. Reference is made to the findings of various reports by non-governmental organizations on the conditions of St. Catherine's Prison. The actual conditions which are said by counsel to apply to the author on death row include being confined in the cell for 23 hours each day, no provision of mattress or bedding for the concrete bunk, no integral sanitation, inadequate ventilation and no natural lighting. In addition, the general conditions of the prison are also claimed to affect the author. Counsel contends that the author's rights as an individual under the Covenant are being violated, notwithstanding the fact that he is a member of a class - those on death row - whose rights are also being violated through being detained in similar conditions. In this respect, counsel contends that a violation of the Covenant does not cease to be a violation merely because others suffer the same deprivation at the same time. The conditions under which the author is detained at St. Catherine District Prison are said to amount to cruel, inhuman and degrading treatment within the meaning of articles 7 and 10, paragraph 1, of the Covenant.

3.8 Furthermore, counsel submits that the cells and prison conditions do not meet the fundamental and basic requirements of the United Nations Standard Minimum Rules for the Treatment of Prisoners and amount to violations of articles 7 and 10, paragraph 1, of the Covenant. In this respect, reference is made to the Committee's jurisprudence.[81]

3.9 Finally, counsel submits that the imposition of a sentence of death upon the conclusion of a trial in which a provision of the Covenant has been breached, if no further appeal against the sentence is available, constitutes a violation of article 6, paragraph 2, of the Covenant. In this respect, counsel contends that: "the imposition of a death sentence where as here the State party knows that the convicted person will be subjected to the conditions which exist on death row (which are contrary to the Covenant) for a protracted period and where that convicted person is then actually subjected to such conditions (which in themselves amount to violations of the Covenant), such treatment amounts to a violation of a protection of the law to the individuals' inherent right to life. The Applicant's inherent right to life does not end with the imposition of the sentence of death. Rather, the sentence of death by a competent Court gives legitimate authority to the State to take the life of a convicted person in a constitutional manner which is not then contrary to any international norm. However, up until the point and time when the sentence of death is carried out, the individuals' right to life continues. Such a right to life is then subject to all applicable international norms, including those covered by the Covenant for the protection of civil and political rights and the United Nations Standard Minimum Rules for the Treatment of Prisoners. Subjecting the Applicant to the conditions at Montego Bay Police Station, as well as the conditions on death row, amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant in conjunction with violations of the provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners. In addition, the violations of articles 9 and 14 also amount to a violation of article 6".

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[81] Communication No. 458/1991 (Albert Womah Mukong v. Cameroon), Views adopted on 21 July 1994, paragraph 9.3. Where it was held that, as to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development (i.e., the Standard Minimum Rules for the Treatment of Prisoners). It should be noted that these are minimum requirements which the Committee considered should always be observed, even if economic or budgetary conditions may make compliance with these obligations difficult.

3.10 It is submitted that the same matter has not been submitted to another procedure of international investigation or settlement.

State party's information and observations and counsel's comments thereon

4.1 In its observations dated 19 September 1996, the State party does not formulate objections to the admissibility of the case but rather directly addresses the merits of the communication.

4.2 With regard to the allegation of violations of article 9, paragraphs 2 and 3, because the author spent 29 days in detention before being formally charged for murder, the State party contends that the period of detention can be broken down into two sections, the first being 26 days, after which the author was released, and the second of three days' detention from 4 May 1992, after which the author was charged with murder. The State party concedes that a detention of 26 days is undesirable, but does not accept that a three-day period constitutes a violation of the Covenant.

4.3 With respect to the undue delay in hearing the author's case because of the two years and four months between the author's detention and his trial, the State party rejects that this delay constitutes a violation of article 9, paragraph 3, and article 14, subparagraph 3 (c), particularly because during this period a preliminary inquiry took place.

4.4 In respect of the allegations of inadequate legal representation in violation of article 14, subparagraphs 3 (b) and (d), the State party contends that if the author was not represented during the preliminary inquiry it was not the State party's responsibility as it had been open to the author to request legal representation. With respect to the author's allegation that he only saw his counsel for short periods of time and the complaint regarding the way counsel conducted the trial the State party contends that it cannot be held responsible for these actions. In the same manner the State party contends that if there was a conflict of interest between the two brothers as the cases against them were different, then it was up to the author or his brother to have requested separate representation.

4.5 With regard to the allegations under articles 7 and 10, paragraph 1, the State party submits that the author has not been on death row for five years, after which point Pratt and Morgan could be invoked, and with respect to the Committee the State party notes that the Committee itself has held that prolonged detention, per se, does not constitute inhuman and degrading treatment.

4.6 With respect to the allegation of a violation of article 14, paragraphs 1, 2 and 3, because the author has been unable to obtain legal aid for constitutional redress the State party does not interpret the Covenant as obliging the Government to provide legal aid for constitutional motions. The State party does, however, concede that indigence may limit access to the Supreme Court to obtain a constitutional remedy.

4.7 The State party submits that as there has been no breach of any of the provisions of the Covenant, there can be no breach of article 6.

5.1 In her comments on the State party's submission, counsel agrees to the joint examination of the admissibility and the merits of the case. She reaffirms that the delay of 29 days in charging the author constitutes a violation of article 9, paragraphs 2 and 3.

5.2 Counsel maintains her allegations that the author has been a victim of violations of article 14, subparagraphs 3 (b) and (d), owing to the inadequate legal representation he received: i.e., no counsel for his first appearance before a judge, the short time he was able to consult with his lawyer and prepare his defence and finally being represented by the same counsel as his brother where there was an evident conflict of interests.

5.3 In a further submission of 6 May 1997, counsel has forwarded a statement from one Glenroy Hodges, allegedly corroborating the author's contention that he was never confronted with his co-accused Steve Shaw, while in police detention.

Admissibility consideration and examination of merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With respect to the author's claim that the two years and eight months that the author has spent on death row, since his conviction, on 25 July 1994, constitutes a violation of articles 7 and 10, paragraph 1, the Committee notes that it remains its jurisprudence[82] that detention on death row for a specific time does not violate the Covenant, in the absence of further compelling circumstances. In the instant case, the Committee considers that neither the author nor his counsel have sufficiently substantiated, for purposes of admissibility, how the 28 months spent on death row, during which the author was availing himself of appeal possibilities against his conviction, entailed a violation of the author's Covenant rights. The Committee therefore finds that this part of the communication is inadmissible.

6.4 As regards the author's claims that he saw his lawyer, senior counsel (Mr. Hamilton QC) several times but only for 8 to 10 minutes each time, that he was not represented until after the preliminary hearing and that counsel took no instructions from him, and in particular did not call a witness whom the author felt should be called, the Committee notes that counsel was initially privately retained, and considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using other than his best judgement and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

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[82] See Communication No. 558/1994 (Errol Johnson v. Jamaica), Views adopted on 22 March 1996.

6.5 As regards the author's claim that his defence was tainted because he was represented by the same counsel as his brother and there was a conflict of interest between them, as the charges against both brothers were different, the Committee notes that the author was represented by senior counsel (Mr. Hamilton QC), that counsel had been privately retained by the brothers for the preliminary hearing, that, before the jury was empanelled, counsel requested first that the author be tried separately and then that he, counsel, be assigned on a legal aid basis to them both. From the trial transcript it is clear that the author was represented at the preliminary hearing by the same Queen's counsel that later represented him on trial. Furthermore, the Committee notes that during the trial, counsel kept his questions on behalf of both brothers separate. The Committee considers that there were no factors giving rise to a conflict of interest in the representation of both accused either when counsel was privately retained or when he was acting as legal aid; therefore these claims remain unsubstantiated, and accordingly this part of the communication is inadmissible.

6.6 As regards the new evidence submitted by counsel, on 6 May 1997, this is a matter which should have been raised before the national courts. Accordingly, the Committee considers that this part of the communication is inadmissible for non-exhaustion of domestic remedies, under article 5, subparagraph 2 (b), of the Optional Protocol.

6.7 The Committee observes that with the dismissal of the author's petition for special leave to appeal to the Judicial Committee of the Privy Council in June 1996, the author has exhausted domestic remedies for purposes of the Optional Protocol. In the circumstances of the case, the Committee finds it expedient to proceed with the examination of the merits of the case. In this context, it notes that the State party has not raised objections to the admissibility of the complaint and has forwarded comments on the merits. The Committee recalls that article 4, paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written observations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee reiterates that this period may be shortened, in the interest of justice, if the State party so wishes.[83] The Committee further notes that counsel for the author has agreed to the examination on the merits of the case at this state.

7. The Committee accordingly, declares the remaining claims admissible and proceeds, without further delay, to an examination of the substance of these claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The author complains that he has been detained on death row in appalling and insalubrious conditions, complaints which are supported by the reports annexed to counsel's submission; neither these nor the author's claims have been refuted by the State party. Counsel's submission summarizes the main points made by these reports, and shows that these conditions affect the author himself, as a prisoner on death row. In the Committee's opinion, the conditions described therein and which affect the author directly are such as to violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1.

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[83] See Views on Communication No. 606/1994 (Clement Francis v. Jamaica), adopted 25 July 1995, paragraph 7.4.

8.2 The author has claimed that the absence of legal aid for the purpose of filing a constitutional motion in itself constitutes a violation of the Covenant. The determination of rights in proceedings in the Constitutional Court must conform with the requirements of a fair hearing in accordance with article 14, paragraph 1.[84] In this particular case, the Constitutional Court would be called on to determine whether the author's conviction in a criminal trial has violated the guarantees of a fair trial. In such cases, the application of the requirement of a fair hearing in the Constitutional Court should be consistent with the principles in subparagraph 3 (d) of article 14. It follows that where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interest of justice so requires, legal assistance should be provided by the State. In the present case, the absence of legal aid has denied the author the opportunity to test the irregularities of his criminal trial in the Constitutional Court in a fair hearing, and is thus a violation of article 14.

8.3 The author has claimed that he was not charged for 29 days, nor was he promptly brought before a judge. In the instant case, the author was kept in detention for 26 days, was released and later arrested and held in detention for three days before being charged and brought before a judicial authority; the Committee notes that the State party itself concedes that there was a delay of 26 days and that this delay is undesirable, though denying that either this period or a further three days might constitute a violation of the Covenant. In the circumstances, the Committee, and notwithstanding the State party's arguments, finds that to detain the author for a period of 26 days without charge was a violation of article 9, paragraph 2, of the Covenant. The failure of the State party to bring the author before the Court during the 26 days of detention and not until three days after his re-arrest was a violation of article 9, paragraph 3.

8.4 As regards the author's claim that he was not tried without undue delay because of the unreasonably long period, 28 months, between arrest and trial, the Committee is of the opinion that a delay of two years and four months between arrest and trial, during which time the author was held in detention was a violation of his right to be tried within a reasonable time or to be released. The period in question is also such as to amount to a violation of the author's right to be tried without undue delay. The Committee therefore finds that there has been a violation of article 9, paragraph 3, and article 14, subparagraph 3 (c).

8.5 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. In the present case, since the final sentence of death was passed without having observed the requirement for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

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[84] See Communication No. 377/1989 (Currie v. Jamaica), Views adopted on 29 March 1994, paragraph 13.4.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 9, paragraphs 2 and 3; article 10, paragraph 1; article 14, paragraph 1 and subparagraph 3 (c), and consequently of article 6 of the Covenant.

10. Pursuant to article 2, subparagraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing commutation.

11. Bearing in mind that by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subjected to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

APPENDIX

Individual opinion by Committee member Nisuke Ando

[Original: English]

I am not dissenting from the Committee's Views, but I would like to point to the following similarities of this communication to Communication No. 708/1996, Neville Lewis v. Jamaica (see the two individual opinions appended to the latter):

(1) The author in both the cases has co-accused and there was a confrontation between the author and the co-accused, each asserting different versions of facts;

(2) The delay between the author's arrest and trial was 26 to 28 months in the instant case and 23 months in Communication No. 708/1996;

(3) In both the cases, the State party argues that a preliminary enquiry took place during the respective period.

Taking these similarities into account and maintaining consistency of evaluation of relevant facts in both the cases, I am unable to persuade myself to conclude that the delay of 26 to 28 months between the author's arrest and trial in this case is entirely attributable to the State party and constitutes a violation of article 9, paragraph 3 (see para. 8.4).

X. Communication No. 708/1996; Neville Lewis v. Jamaica (Views adopted on 17 July 1997, sixtieth session)[*]

Submitted by:	Neville Lewis [represented by S J Berwin and Co, a London law firm]
Victim:	The author
State party:	Jamaica
Date of communication:	24 May 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 1997,

Having concluded its consideration of Communication No. 708/1996 submitted to the Human Rights Committee on behalf of Mr. Neville Lewis under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol[**]

1. The author of the communication is Neville Lewis, a Jamaican citizen, currently awaiting execution at St. Catherine District Prison in Jamaica. He claims to be a victim of violations of articles 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by Mr. David Stewart, solicitor with S J Berwin and Co in London.

Facts as submitted

2.1 The author and his co-defendant Peter Blaine were convicted of the murder of one Victor Higgs and sentenced to death on 14 October 1994 by the Home Circuit Court in Kingston. Their appeal was dismissed by the Court of Appeal on 31 July 1995 and on 2 May 1996, the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was refused. The author states that all domestic remedies have thus been exhausted. He claims that a constitutional remedy is not available to him because of his indigence, since Jamaica does not provide legal aid for constitutional motions.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[**] The texts of four individual opinions by Committee members Nisuke Ando, Lord Colville, Rajsoomer Lallah and Martin Scheinin are appended to the present document.

2.2 The author was arrested on 11 November 1992, some three weeks after Mr. Higgs had been found dead, and taken into custody at Lionel Town Police Station. During interrogation by the police, the author initially denied any involvement. He claims, however, that he was then severely beaten and as a result agreed to sign blank sheets of paper. He claims that these sheets were later used to forge his caution statement, in which he admitted having been with Blaine at the scene of the murder, accusing Blaine of having carried out the murder. (The veracity of the author's statement was never brought up at trial. Indeed, the author's counsel at trial said that the statement was fully accepted.)

2.3 After he made his statement to the police, the author was transferred to the Central Police Station in Kingston and charged with the murder of Mr. Higgs. He spent a week in a filthy cell together with seven other detainees. The author states that he did not have any contact with his lawyer until he was brought to court, for the first of many preliminary hearings, approximately a week after he was charged. At that hearing, the author met two co-accused, known to him as "Garfield", and Cecil Salmon. The hearing was adjourned.

2.4 Following the adjournment, the author was remanded in custody at St. Catherine District Prison, in a cell with 18 to 25 other prisoners. Eventually, the author's co-accused[85] were released on bail, but the author remained in police custody. On 23 February 1993, a preliminary enquiry was held, and the case was then transferred to the Home Circuit Court in Kingston for trial. The author was remanded in custody at the General Penitentiary in Kingston. The author states that he was kept with convicted prisoners in a cell without basic sanitary facilities.

2.5 On 5 October 1994, the trial against the author and his co-accused Peter Blaine started.[86] At trial, the case for the prosecution was that Mr. Higgs, an American businessman travelling in a Honda motor car, stopped at a road junction to ask for directions at about 5 p.m. on 18 October 1992. The author and Blaine entered his car offering to direct him. Mr. Higgs' body was found four days later in a mud lake. His car had been found the previous day, its appearance having been altered by changing the registration plates and tinting the windows. The victim had been strangled with a strip of grey cloth wound around his neck. His hand and feet were bound with the same cloth and an attempt had been made to sink the body by weighting it with a piece of railway line. The prosecution called witnesses who had seen the author and his co-accused enter the victim's car, a witness who had helped the accused in tinting the windows of the car, and a policeman who had stopped the accused while driving in the car on 19 October 1992. Medical evidence was led as to the cause of death, strangling with a piece of cloth. The caution statements made by the two accused were also led as evidence.

2.6 The author's co-accused Peter Blaine made an unsworn statement from the dock, admitting to taking a ride with Higgs on 18 October 1992, together with the author and two other youths. He blamed the author for having concocted the plan to steal Higgs' car and murder him.

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[85] It appears from the trial transcript that at the time of the trial against the author the two co-accused were in detention on charges of being accessory after the fact.

[86] It appears that Blaine was arrested only on 12 July 1994.

2.7 The author gave sworn evidence, stating that it was Blaine who had attacked Higgs and had forced the author to cooperate, despite his pleas to leave the man alone. One other witness, a policeman, was called on the author's behalf and testified as to the willingness of the author to cooperate. At the trial, the author was represented by a Queen's counsel, who had been retained for him by an ex-girlfriend. Allegedly he only met his representative 30 minutes before the beginning of the trial and was unable to examine the evidence with him.

2.8 On 15 December 1994, the author wrote to the Ombudsman to complain that he had been forced by the police to sign blank sheets of paper, and that when he arrived at the court on 5 October 1994, his lawyer was not yet there and he was approached by a detective who told him what evidence to give, which he then did.[87] The Ombudsman, in his reply of 21 March 1995, replied that he should raise these issues on appeal and that allegations of misconduct by the police should be directed to the Police Complaints Department to be investigated.

2.9 On 20 June 1995, the Registrar of the Court of Appeal informed the author that he would be represented on a legal aid basis by a lawyer, who had not earlier been involved with the case. He was also informed that the hearing would be held in the week of 10 July 1995. The author states that he never met his lawyer. The appeal was argued on three grounds of misdirections by the judge to the jury.

Complaint

3.1 As regards the events before the trial, the author claims that he is a victim of a violation of articles 7, 9, 10 and 14, paragraph 2, of the Covenant. He recalls that he was severely beaten upon arrest, that he was forced to sign blank sheets of paper, that he was kept in detention with convicted prisoners, and that he was kept in custody for 23 months until the beginning of the trial. The author claims that the delay in bringing him to trial was due to the fact that without Blaine's testimony, there was not enough evidence against him. In this context, he claims a violation of article 14, paragraph 2. The author further states that the fact that he was kept in detention throughout hindered him in the preparation of his defence, and that he met his privately retained lawyer for the first time only 30 minutes before the beginning of the trial. This is said to constitute a violation of article 14, subparagraph 3 (b).

3.2 As regards the trial, the author claims that the extensive media coverage before and during his trial, prejudiced his right to a fair trial and the right to be presumed innocent. In this connection, the author states that he requested the Court at the beginning of the trial to bar the press from attending, which was refused.[88] During the trial, an erroneous broadcast stated that the author had admitted to taking part in the murder of Higgs. The author's counsel mentioned this to the trial judge, who then instructed the jury to disregard any media coverage of the case.

3.3 The author further claims that the judge did not adequately instruct the jury as to the evidence the two accused entered against each other. He also claims that he wanted his counsel to call his girlfriend to give evidence on his behalf, but that she was never called, in violation of article 14, subparagraph 3 (e).

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[87] This seems to contradict the statement that the author saw his counsel half an hour before the beginning of the trial. The trial transcript further shows that the author gave evidence in the afternoon of 11 October 1994, with his counsel leading him.

[88] No support for this claim is found in the trial transcript.

3.4 The author claims that the delays in the proceedings against him (three and a half months between his arrest and the preliminary enquiry, 16 months between his arrest and the arraignment, and nearly two years between his arrest and the trial) constitute violations of article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant.

3.5 As regards the appeal, the author claims that the legal aid lawyer who argued his appeal, failed to properly prepare the appeal, since he never met with the author before the hearing. This is said to constitute a violation of article 14, subparagraph 3 (b).

3.6 The author claims that the imposition of the death penalty was in violation of article 6 of the Covenant, because of the previous violations of the Covenant.

3.7 The author claims that the circumstances of his detention on death row at the Gibraltar block at St. Catherine Prison are in violation of article 10 of the Covenant. He claims that the cell block is dirty, smelly and infected with insects. He alleges that he is confined to his cell for 24 hours a day, with the exception of five minutes to slop out. There is no artificial light in the cell and he is only allowed to see visitors once a week for five minutes. The author also claims a violation of article 10, paragraph 3, because the Jamaican Penitentiary System does not in practice aim to achieve the social rehabilitation and reformation of prisoners. In this context, the author refers to the overcrowding of prisons and the imposition of the death penalty as a form of punishment.

3.8 It is stated that the same matter has not been submitted to another procedure of international investigation or settlement.

State party's observations and the author's comments thereon

4.1 By submission of 23 September 1996, the State party notes that the author alleges that he was ill-treated by the police during his initial detention. The State party further notes that the author wrote to the Ombudsman who then replied and directed him to the Police Complaints Authority. The author, however, failed to pursue this course of action, nor did he raise the matter at any stage of his trial. The State party therefore argues that this claim is inadmissible for non-exhaustion of domestic remedies.

4.2 The State party denies a violation of article 9 of the Covenant. As regards his complaint that he was not allowed to see an attorney, the State party indicates that it will investigate the matter.

4.3 As regards the author's continued pre-trial detention, the State party submits that the refusal to grant bail does not constitute a violation of the Covenant. In the State party's opinion, there are circumstances in which a person should not be granted bail and these circumstances are best determined by a magistrate. The duty of the State is to review regularly the circumstances of the individual's detention in order to determine whether there has been a change in circumstances justifying the release of the individual. This, the State party submits, was done and therefore there was no breach of articles 9 and 14, paragraph 2, of the Covenant.

4.4 As regards the length of the pre-trial detention, the State party explains that during the 23 months, a preliminary enquiry was held and the author appeared in court on several occasions. According to the State party, the delay therefore does not constitute undue delay in violation of the Covenant. As regards the three months' delay between the author's arrest and the preliminary hearing, the State party explains that the author appeared in Court during that period on several occasions and argues that there was no undue delay which would amount to a violation of the Covenant. Nor does the period of 16 months between the author's arrest and arraignment, during which period the author appeared in Court several times and a preliminary inquiry was held, constitute a violation of the Covenant, in the opinion of the State party.

4.5 As regards the author's claim that a violation of article 14, paragraph 1, occurred because of the media coverage of the case, which would have influenced the jurors against him, the State party notes that it was open to the author to raise this issue at trial or on appeal, but that he failed to do so. The State party therefore argues that this aspect of the communication is inadmissible for non-exhaustion of domestic remedies.

4.6 As regards the author's contention that his right to have adequate time and facilities for the preparation of his defence was breached since his continued detention hindered him and he had only minimal contact with his attorney for his trial and none with his appeal attorney, the State party denies that pre-trial detention as such would hinder the preparation of the defence to the extent that it would lead to an unfair trial. As regards the legal representation, the State party maintains that it is its responsibility to appoint competent counsel to represent persons who require legal aid. How counsel conducts the case is not a matter for which the State party can be held accountable under the Covenant.

4.7 The State party notes that the author also complains about the judge's instructions to the jury and points out that the Committee has recognized that this is a matter which falls within the jurisdiction of the appellate courts.

4.8 As regards the author's claim under article 14, subparagraph 3 (e), the State party notes that the author fails to indicate why his girlfriend was not called to give evidence. The State party argues that it cannot be held responsible for the failure to call her, unless it can be attributed to some action by the State authorities.

5.1 In his comments on the State party's submission, counsel argues that the communication is admissible and that the State party has failed to address certain issues raised by the communication, which must be taken as an acknowledgement of their admissibility. As regards the merits of the communication, counsel submits that the State party has undertaken to investigate why the author was not able to see an attorney, and moreover, that there are a number of matters which would require further investigation by the State party, before the Committee could determine the merits of the case.

5.2 As regards the State party's argument that the author's claim concerning his ill-treatment at the hands of the police is inadmissible for non-exhaustion of domestic remedies, counsel recalls that the author complained in writing to the Ombudsman on 15 December 1994. He received a reply from the Ombudsman on 21 March 1995, in which he was referred to the Police Complaints Department in Kingston. Counsel points out that at the time, the author was already on death row and in practice it was impossible for the author to lodge a complaint with the Police Complaints Department because of his vulnerable position, exposed to brutality and intimidation by prison guards. Counsel points to the inherent difficulty of a detainee to prove allegations of torture or ill-treatment and, with reference to the Committee's jurisprudence in Ramirez v. Uruguay,[89] argues that where the author has given adequate particulars of the acts concerned, a refutation by the State party in general terms is not sufficient. Counsel contends that the author had no reasonable prospect of a complaint to the Police Complaints Department succeeding, and that, on the contrary, such a complaint would only result in reprisals by the guards. He therefore decided not to write, but to pursue his other legal remedies on appeal and in the international tribunals.

5.3 Counsel notes that the State party has not contradicted the author's allegations concerning the conditions of detention on death row, which allegedly constitute in themselves a violation of articles 7 and 10, paragraph 1, of the Covenant.

5.4 As regards the author's pre-trial detention, counsel submits that the author had no prior convictions and was ignorant as how to deal with the police. It is submitted that he was tricked by the police into testifying against himself, something the State party should be held accountable for.

5.5 Counsel submits that the State party has failed to address the author's allegations that the presumption of innocence was not respected in his case, particularly in the light of the fact that his co-accused Peter Blaine was only arrested on or about 12 July 1994, some three months before trial.

5.6 As regards the 23 months delay between arrest and trial, counsel notes that the State party has denied that the delay was unreasonable but has not offered to investigate the reasons for it. Counsel contends that the lengthy incarceration was extremely unjust because the author was unable to meet his defence attorneys to prepare adequately his defence. This breach is said to be a violation of the State party's obligations under article 9, paragraph 3, and ultimately an infringement of the author's right to life protected under article 6 of the Covenant. According to counsel, even though the delay of three months between arrest and preliminary hearing may not be unreasonable because the author appeared in court several times, this argument cannot be relied upon by the State party to justify the delay of 16 months between the author's arrest and his arraignment on 6 April 1994. It is submitted that the authorities should not have been allowed to hold the author until they arrested Blaine, his co-accused, in July 1984, and that this constituted a violation of article 14, subparagraph 3 (c).

5.7 As regards the media coverage and the prejudices this created in respect of the author and his co-accused, counsel states that both the author and his co-accused attempted to have the press excluded from the court room prior to the initial hearing, but this was denied. Further, it is submitted that the police distributed a passport photograph of the author to the press, which was used to implicate him in the murder. The author maintains that the publicity of his involvement in the crime prejudiced his trial and the interests of justice, in contravention of article 14, paragraph 1. As regards the State party's argument that the author did not exhaust domestic remedies, counsel states that he does not know of any Jamaican case where the courts have stayed proceedings because of adverse publicity. He therefore submits that there was no effective remedy available to him, since the trial judge refused the application to exclude the press from the court. According to counsel, the matter could not have been raised as a ground of appeal, neither to the Court of Appeal in Jamaica nor to the Judicial Committee of the Privy Council.

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[89] Communication No. 4/1977, Views adopted by the Committee at its tenth session, on 23 July 1980.

5.8 With regard to the inadequacy of time and facilities for preparation of the author's appeal, counsel recalls that the author was represented on appeal by a legal aid lawyer who did not come to discuss the case with him, despite the fact that the author had written to him to say that he had important information. In general, counsel submits that the State party only provides the most meagre level of legal aid to indigent defendants. As a result, it is often inexperienced counsel who take on death row cases, who, because of the level of remuneration will almost inevitably reduce the time in preparation of the case.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, subparagraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the author's claim that media coverage prejudiced the jury against him is inadmissible for non-exhaustion of domestic remedies. It notes that this matter was not raised by the author or his counsel during the trial, as it was incumbent upon them to do. Accordingly, the Committee considers that this part of the communication is inadmissible.

6.4 The Committee further notes the State party's argument that the author's claim that he was beaten upon arrest is inadmissible for non-exhaustion of domestic remedies. It notes that neither the author nor his counsel raised this issue during the trial as it was incumbent upon them, and that the author's defence at trial was partly based on the voluntariness of his statement and his cooperation with the police. The Committee, therefore, considers that this claim is inadmissible.

6.5 As regards the author's claim that the judge's instructions to the jury were inadequate, the Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate courts of States parties, to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.6 As regards the author's claim that his lawyer failed to call his girlfriend as a witness at the trial, the Committee considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using his best judgement and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considers that the author has failed to substantiate, for purposes of admissibility, that he is a victim of a violation of article 10, paragraph 3. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.8 The Committee notes that the State party has shown a willingness to have the instant communication examined on the merits, insofar as it had no objection to admissibility. The Committee has taken note of counsel's argument that a number of matters would still require investigation by the State party. Nevertheless, the Committee is of the opinion that the information before it is sufficient to allow an examination of the merits of the communication.

7. In the circumstances, the Committee decides that the author's remaining claims are admissible and proceeds to an examination of the substance of those claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The author has argued that the 23 months' delay between his arrest and trial was unduly long and constitutes a violation of article 9, paragraph 3, and article 14, subparagraph 3 (c), of the Covenant. Article 9, paragraph 3, entitles an arrested person to trial within a reasonable time or to release. The Committee notes that the arguments forwarded by the State party do not give an adequate explanation why the author, if not released on bail, was not brought to trial for 23 months. The Committee is of the view that in the context of article 9, paragraph 3, and in the absence of any satisfactory explanation for the delay by the State party, a delay of 23 months during which the author was in detention is unreasonable and therefore constitutes a violation of this provision. The Committee does not, in the circumstances, consider it necessary to consider the question of violation of article 14, subparagraph 3 (c).

8.2 In the context of the delay, the author has also argued that his right to presumption of innocence was violated, because the delay was caused by the failure of the police to find his co-accused and that in the absence of his co-accused there was not enough evidence against him. The Committee notes that the author was arraigned before his co-accused was apprehended, which shows that there was sufficient _prima facie_ evidence against him to put him to trial. In the circumstances, the Committee finds that the facts before it do not disclose a violation of article 14, paragraph 2.

8.3 The author has also argued that his continued detention hindered him in the preparation of his defence, since he could not freely consult with his counsel. In this context, the Committee notes that the State party has said it would investigate why the author was not allowed to see an attorney. The Committee observes, however, that the author has never claimed that he was not allowed to see an attorney and that he in fact saw an attorney a week after his arrest. In the instant case, the information before the Committee does not show that the restrictions placed on the author hindered the preparation for his defence to such an extent as to constitute a violation of article 14, subparagraph 3 (b), of the Covenant. In this context, the Committee notes also that neither the author nor his counsel requested more time for the preparation of the defence at the beginning at the trial.

8.4 As regards the author's argument that he was not effectively represented on appeal, since his legal aid lawyer failed to consult with him, the Committee notes that the author was informed beforehand who would represent him at the appeal, that he was informed of the date of the hearing and that counsel for the author did argue the appeal on his behalf. The Committee recalls its jurisprudence that under article 14, subparagraph 3 (d), the court should ensure that the conduct of a case by the lawyer is not incompatible with the interests of justice. In the instant case, nothing in the conduct of the appeal by the author's lawyer shows that he was not using his best judgement in the interests of his client. The Committee concludes therefore that the information before it does not show that article 14, subparagraph 3 (d), has been violated.

8.5 The Committee notes that the State party has not contested the author's claims under article 10 of the Covenant: (a) that after his arrest he spent a week in a filthy cell with seven other prisoners; (b) that in the General Penitentiary he was kept with convicted prisoners in a cell without basic sanitary facilities; and (c) that the cell in which he is held on the death row is dirty, smelly and infected with insects and that he is in there all day, except for five minutes to slop out and during visits, once a week for five minutes. The Committee finds that, in the circumstances, the facts presented by the author constitute a violation of article 10, paragraph 1 and subparagraph 2 (a), of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraph 3, and article 10, paragraph 1, of the Covenant.

10. The Committee is of the view that Mr. Neville Lewis is entitled, under article 2, subparagraph 3 (a), of the Covenant, to an effective remedy, including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

APPENDIX

A. Individual opinion by Committee member Lord Colville (*dissenting*)

[Original: English]

1. I am unable to agree that the delay of 23 months which elapsed between the author's arrest and trial constitutes a violation, on the facts of this case, of article 9, paragraph 3, of the Covenant. The crucial matter is that concerning his statement, which in paragraphs 2.2 and 3.1 of the Views he complains was falsely obtained after his being beaten by the police.

2. This statement, which contained his confession to an involvement in the killing of the victim, was central to the author's defence at his trial, and was always so intended. Contrary to his claim, a study of the trial transcript shows that the statement was taken voluntarily, in the presence of a Magistrate who attended for this purpose at the request of the police officer in charge of his case. It was confirmed at the trial, by his counsel and by the author in the course of his sworn evidence, to be true: he never complained that it had been extracted from him in the manner now claimed. To the contrary, it was an essential part of his defence, in his attempt to ensure that his conviction (which was virtually certain) was for non-capital murder under section 2(2) of the Offences against the Person (Amendment) Act 1992, in that, he claimed, he had "not himself used violence on that person in the course or furtherance of an attack" on him - see Court of Appeal judgement, 31 July 1995, p. 17 and 18. The author's defence was, and had always been, to transfer the blame for all application of violence to his co-defendant, Peter Blaine. Such a line of defence (colloquially known to common lawyers as a "cut-throat" defence) would have stood very little chance of success unless the same jury was also engaged in the decision whether they could convict Peter Blaine, in accordance with the proper rules of procedure, exemplified in article 14, paragraph 2, of the Covenant.

3. In the event the author's defence on these lines was not successful, possibly because of major inconsistencies between what he had said in the statement before the Magistrate and the evidence he gave during the trial. Nevertheless it was sufficiently important to him to give sworn evidence, and to subject himself to cross-examination by the prosecution and also counsel for his co-defendant (which did occur), in order to seek to obtain a non-capital verdict.

4. The author's co-defendant, Peter Blaine, had gone into hiding after the murder and there was a police block on Jamaican ports to prevent his leaving the jurisdiction. It was not open to the author to assist in his apprehension but it was essential to the author that he should not be tried alone, by a jury not also seized of the case of Peter Blaine. No complaint is made that the author sought release on bail, whatever the probabilities of such an application being successful, and he gives no information in that respect.

5. As for the author's claim, in paragraph 3.1 of the Views, that there was insufficient evidence, without that of Peter Blaine, to bring him to trial, this is wholly inconsistent with (a) his initial statement, (b) his sworn evidence at the trial and (c) his own adopted line of defence which was to transfer any liability for capital (as opposed to non-capital) murder on to his co-defendant, Peter Blaine.

6. Accordingly I am of the opinion that the author's substantive rights under the Covenant were neither invoked nor violated in the respect set out above.

B. Individual opinion by Committee member Nisuke Ando (*dissenting*)

[Original: English]

After carefully reading the individual opinion of Lord Colville, I am unable to concur with the Views of the Committee that the delay of 23 months in this case between the author's arrest and trial constitutes a violation of article 9, paragraph 3, of the Covenant (para. 8.1).

In this connection, the Committee notes that "the arguments put forward by the State party do not address the question of why the author, if not released on bail, was not brought to trial for 23 months" (ibid). However, according to the State party, "during the 23 months, a preliminary enquiry was held and the author appeared in court on several occasions" (para. 4.4). Furthermore, Lord Colville's opinion makes clear that "it was essential to the author that he should not be tried alone, by a jury not also seized of the case of Peter Blaine" (individual opinion, para. 4), the co-accused of the same murder charge who was arrested probably early in July 1994, some 20 months after the author was arrested (Views in Communication No. 696/1996, paras. 2.1 and 3.4). In fact, Lord Colville notes that "[n]o complaint is made that the author sought release on bail" and that "he gives no information in that respect" (individual opinion, para. 4).

All the above indicates to me that the delay of 23 months between the author's arrest and trial was not necessarily caused by the State party's inaction but was essentially caused by the convenience of the author himself. Since it is an established jurisprudence of the Committee that the prolongation of judicial proceedings caused by an author should not be attributable to the State party concerned, I am unable to concur with the Views in this case that the 23 months' delay between the author's arrest and trial constitutes a violation of article 9, paragraph 3, of the Covenant.

C. Individual opinion by Committee member Rajsoomer Lallah (*dissenting*)

[Original: English]

I am unable to agree with the Committee's view that there has been a violation of article 9, paragraph 3, in the present case. The grounds relied upon by the Committee are, first, that the period of 23 months which had elapsed between the arrest of the author and his trial was unreasonable and, secondly, that the State party had not given any satisfactory explanation which would account for the length of this period.

The State party did provide some explanations which, in my view, were quite relevant. These could legitimately be considered in the context of other relevant factors shown in the case record. Those explanations and the record indicate the following: the police first conducted an enquiry; on the basis of that enquiry, a preliminary enquiry was held before a court and the author appeared several times in court; at the close of the committal proceedings, the author was committed by the court for eventual trial; the trial did not take place in the normal course since the police then succeeded in arresting a co-accused, and it must be assumed that a preliminary enquiry had to be held with regard to the participation of the co-accused, so that there could be a joint trial of the author and his co-accused in respect of a joint offence. It would seem to me that, in these circumstances, it could not be said that the time that elapsed between the committal of the author and beginning of his trial, though ex facie somewhat long, was unreasonable.

It is worthy of note that there does not appear to have been any attempt by the author to seek any order from the court to be tried within a reasonable time, if it appeared to him that proceedings were dragging on.

D. Individual opinion by Committee member Martin Scheinin (*partly dissenting*)

[Original: English]

I share the Views of the Committee with respect of the issues where a violation of the Covenant has been established.

In addition the author has complained of a violation of article 9, paragraph 3, of the Covenant and counsel's presentation of the facts refer to a delay of one week before the author was first brought before a judge after being taken into custody by the police. As the State party has failed to address this issue or to present any information of the author in fact being brought before a judicial authority during the first week of his detention, I believe the right of a person detained on a criminal charge to be promptly brought before a judge or other judicial authority, as secured in the first part of article 9, paragraph 3, also has been violated.

After a finding of a multiple violation of the Covenant the commutation of the death sentence is, in my opinion, the only appropriate remedy to be recommended.

ANNEX VII

Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol

A. Communication No. 579/1994; Klaus Werenbeck v. Australia (Decision of 27 March 1997, fifty-ninth session)[*]

Submitted by: Klaus Werenbeck

Victim: The author

State party: Australia

Date of communication: 31 May 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Klaus Werenbeck, a German citizen who, at the time of submission of the complaint, was detained in Australia. He claims to be the victim of a violation by Australia of article 9, paragraph 3, article 10, paragraph 1, and articles 14, 16 and 26 of the Covenant. The Covenant entered into force for Australia on 13 November 1980, and the Optional Protocol on 25 December 1991.

Facts as submitted by the author

2.1 On 5 June 1989, the author was stopped at Brisbane Airport on suspicion of illegally having imported narcotics into Australia. He was formally arrested and charged on 7 June 1989 and brought before the Brisbane Magistrate Court. On 8 March 1990, after a four-day trial, he was convicted of the charge and, on 23 March 1990, sentenced to 13 years and four months' imprisonment with a recommendation to serve a minimum of six and a half years. Although the author's lawyers advised him that an appeal would be ineffective, the author filed an appeal with the Court of Criminal Appeal on 23 April 1990. On 12 June 1990, the author was given an extension of time and upon recommendation of the presiding judge legal aid was granted to him. On 29 October 1990, the author's appeal against his conviction was dismissed and his application for leave to appeal against sentence was refused.

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[*] The following members of the Committee participated in the examination of the communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Ms. Laure Moghaizel, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin and Mr. Maxwell Yalden.

2.2 The case for the prosecution was that the author, on 5 June 1989, had entered Australia by international airline from Thailand. When his luggage was checked by Customs Officers, it was discovered that one of the author's bags had a false bottom, under which heroin was hidden. The heroin was found to weigh 5.3469 kilograms and amounted to 3.635 kilograms of pure heroin. Upon questioning, the author stated that he had been told the bag was valuable and that he was going to be paid US$ 32,000 upon delivery of the bag. He denied, however, that he knew that it was heroin he transported. Upon discovery of the heroin, the author assisted the police by keeping the arrangements for the handing over of the bag, as a result of which other suspects could be arrested.

2.3 The author submits that he did not know at all that anything of value was hidden in the bag; he states that he was under the impression that the $32,000 he was to be paid was for building and business plans, which were in the bag. The author further submits that, after his arrest, he acted upon instructions from the police in his dealings with his Thai contacts, that the police arranged compromising situations for him and that from those events no evidence of his guilt can be deduced.

2.4 The author appealed his conviction, inter alia, on the grounds that he had not had enough time to consult with his solicitor, that he was sick during the trial, that he had often been unable to follow the translation from English to German during the trial, that because of the faulty translation he made mistakes detrimental to his defence, and that no defence witnesses were called. In the judgement of the Court of Appeal, it is indicated that, although investigations had been made in relation to the issue of the translation, counsel for the author was not able to advance this point any further.

Complaint

3.1 The author claims that his pre-trial detention of nine months was excessive and in violation of article 9, paragraph 3, and article 14, subparagraph 3 (c).

3.2 The author also claims that he is a victim of a violation of article 10, since he did not receive proper medical treatment during his detention, as a result of which he was not feeling well during the trial.

3.3 The author states that at first he was represented by a private lawyer, but as a result of financial difficulties this lawyer stopped acting for him, only 10 days before the committal, which took place on 22 September 1989. On 19 September 1989, he was granted legal aid. During the committal hearings he was represented by a certain lawyer and he wanted this lawyer to defend him at the trial. However, 11 days before the beginning of the trial on 5 March 1990 a new lawyer came to see him in prison in order to prepare the defence and eventually represented him before the Court. The author claims that these events constitute a violation of his right under article 14, subparagraphs 3 (b) and (d), to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. He likewise claims that the preparation of his defence before the Appeal Court was insufficient, since the legal aid lawyer came to visit him for the first time only seven days before the appeal hearing.

3.4 The author further claims that article 14, subparagraphs 3 (a) and (f), were violated in his case, because he was not informed in detail and in a language he understood of the charges against him. He states that he has only little knowledge of English and therefore depended on translations and interpretation. He claims that, because of the bad quality of the interpretation during the trial, he could only understand half of what was being said, and that as a consequence mistakes to his disadvantage were made. In particular, he mistakenly replied in the negative when asked whether he had any evidence to lead in his defence. Although his counsel was informed of the author's dissatisfaction, he did not take any steps to improve the interpretation. He further claims that the translations of his German statements into English contain mistakes.

3.5 The author also claims that no witnesses were called on his behalf, despite his repeated requests to counsel. He submits that he had wanted to call German witnesses to give evidence about his character and to testify that he went to Australia with the intention to do business, not to smuggle heroin. He claims that the failure to call witnesses on his behalf constitutes a violation of article 14, subparagraph 3 (e).

3.6 The author further claims that his sentence of 13 years and four months' imprisonment is too harsh and in violation of article 26. In this connection, he explains that, in 1991, a Lebanese citizen, who was arrested at the airport with two kilograms of heroin concealed in a bag, was acquitted by the Court. The author contends that the circumstances in the case were similar, in particular that both the Lebanese and he were unaware of the fact that heroin had been concealed in their bags, and claims that his conviction violates his right to equal protection by the law. In this context he also alleges a violation of article 16 of the Covenant.

3.7 The author submits that under Australian law an appeal to the Court of Appeal can only be argued on points of law. He claims that this is in violation of article 14, paragraph 5, to have his conviction reviewed, since a retrial will only be ordered if the Court of Appeal finds that an error of law has been committed. He further argues that article 14, subparagraph 3 (d), was violated during the appeal, since he was not present during the hearing, although he had indicated that he desired to be.

3.8 The author submits that his lawyer told him, after the dismissal of the appeal, that the matter could not be taken any further and failed to inform him about the possibility of an appeal to the High Court. Since a case has to be presented to the High Court within 21 days from the date of the decision of the lower court, and the author could not do so himself but needed legal representation to do it, the author claims that he was denied a review by a higher tribunal, in violation of article 14, paragraph 5.

3.9 Finally, the author complains that during a transfer from one prison to another sometime in 1991 tapes with German translations of the English original tapes of the trial, were lost. Since they could not be located, he was compensated $995. According to the author this amount is too low and he claims compensation of $5,911.

State party's comments on admissibility

4.1 At the end of January 1996, the State party submitted its comments on the admissibility of the communication.

4.2 As regards the author's claim concerning article 9 of the Covenant, the State party notes that the author was kept in pre-trial detention from 5 June 1989 until 4 March 1990, prior to the entry into force of the Optional Protocol on 25 December 1991. The State party argues therefore that the claim is inadmissible *ratione temporis*. In this connection, the State party refers to the Committee's jurisprudence according to which the test of admissibility ratione temporis is whether the alleged violations of human rights continue after the date of entry into force of the Optional Protocol for the State party concerned or have effects which in themselves constitute a violation of the Covenant after that date. The State party further refers to the Committee's decision in Communication No. 520/1992 (E. and A. K. v. Hungary, declared inadmissible on 7 April 1994) where the Committee noted that a continuing violation is to be interpreted as an "affirmation, after entry into force of the Optional Protocol, by act or by clear implication of the previous violations". The State party submits that the author's claim under article 9 of the Covenant is severable from the other alleged violations and that in imposing sentence on the author the trial judge made allowance for the period the author had spent in remand. According to the State party this indicates that there are no continuing violations or effects of the alleged violation, rendering the claim inadmissible ratione temporis.

4.3 As regards the author's claim under article 10 of the Covenant, that he did not receive proper medical treatment during his detention, the State party notes that this allegedly occurred before 8 March 1990, and that the claim is therefore inadmissible ratione temporis.

4.4 Moreover, the State party submits that the author has not sufficiently substantiated his claim, as required by rule 90 (b) of the Committee's rules of procedure. The State party notes that the author has not given details concerning his alleged illness, nor has he submitted details concerning the alleged lack of medical treatment. The State party notes that the author's claim was before the Court of Criminal Appeal, which rejected it. The State party also refers to the author's prison records for the relevant period of time, which indicate that he was medically examined upon entering the prison on 3 July 1989, and on three subsequent occasions, and that no medical conditions were found. The author was provided with an interpreter during these examinations and the records do not show any complaints about the medical treatment. The records do show that the author constantly complained of coldness and that he was given extra blankets. The State party argues therefore that the claim is inadmissible under article 2 of the Optional Protocol.

4.5 As regards the author's claims under article 14 of the Covenant, the State party, noting that the trial against the author was held from 5 to 8 March 1990, and that his appeal was dismissed by the Court of Criminal Appeal on 23 April 1990, argues that his claims are inadmissible ratione temporis. Moreover, the State party argues that the claim is inadmissible ratione materiae.

4.6 As regards the author's legal representation, the State party notes that, under the Covenant, no right exists to legal counsel of one's own choosing when legal assistance is assigned free of charge, nor to continuous representation by the same legal counsel. The State party points out that the author benefited throughout from public legal counsel provided by the Queensland Legal Aid Commission. The State party further submits that the author has failed to substantiate his claim that he had no time to prepare his defence. The State party notes that public counsel who represented the author at trial, was experienced and competent in the defence of criminal matters and that he, at the commencement of the trial, was satisfied that the matter had been properly prepared. In this context, the State party points out that the question of preparation of the defence of an accused in a criminal trial is one of professional judgement.

4.7 As regards the representation at appeal, the State party points out that the author was assigned legal aid for the conduct of his appeal on 7 June 1990. Counsel was experienced in appeals and had the assistance of an appeal clerk. In this context, the State party argues that because of the nature of an appeal, no detailed, if any, instructions are necessary from a client and that a meeting seven days prior to the appeal is therefore to be considered sufficient. Had counsel felt unprepared, he would have asked for an adjournment. The State party submits therefore that the author's claim is unsubstantiated.

4.8 As regards the author's claim under article 14, subparagraph 3 (a), the State party submits that the author has failed to substantiate his claim. The State party refers to sworn evidence given by a German and English speaking police constable at trial that the author was informed in detail of the charge against him in the German language in the evening of 7 June 1989.

4.9 The State party argues that the author has failed to substantiate his claim under article 14, subparagraph 3 (f). The State party submits that the author was provided with free interpreter and translator services by the Government Translating and Interpreting Services. At trial an interpreter, a native German speaker and graduate from Queensland University, with full qualifications, was appointed. The interpreter's performance record, for her working period of 1989 to 1994, was outstanding and there is no record of client dissatisfaction or complaint against her. The State party further refers to the trial transcript which shows that the judge provided clear directions for the interpretation of all that was being said in Court. The State party also notes that the author has not provided information about the extent or nature of the alleged mistakes in translation.

4.10 As regards the author's specific claim that, because of the bad quality of the interpretation, he replied in the negative when asked whether he had any evidence to lead in his defence, the State party refers to the trial transcript and notes that the author was not called as a witness during the trial. When the author was directly addressed, immediately after the verdict of guilty had been pronounced against him, he appeared confused and the trial was adjourned so as to clarify any possible confusion. The State party therefore submits that this part of the communication is also inadmissible for lack of substantiation. The State party further refers to the judgement of the appeal court in the author's case, where it is stated that counsel for the author, after having made investigations into the issue of translation and after having spoken with the interpreter, was unable to advance the point. The State party submits that the correctness of translations is a question of fact, which has been determined by the Court of Appeal, and that the Committee is not competent to review the determination by the appeal court.

4.11 As regards the author's claim that no witnesses were called on his behalf, the State party submits that the author was given the same powers as the prosecution to compel attendance of witnesses and to examine or cross-examine witnesses. The State party states that it was a matter of professional judgement by the author's legal representative whether to call witnesses for the defence or not. The State party refers to the Committee's jurisprudence that a State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice (Perera v. Australia, Communication No. 536/1993, declared inadmissible on 28 March 1995). The State party concludes that the author has failed to advance a claim under article 2 of the Optional Protocol.

4.12 As regards the author's claim that his right under article 14, paragraph 5, was violated, because the law in Australia allows only an appeal to be argued on points of law, and therefore does not constitute a real review, the State party submits that the appeal procedure in Queensland is compatible with article 14, paragraph 5, and that the Queensland Court of Criminal Appeal did review the author's conviction and sentence. In this context, the State party explains that according to the Queensland Criminal Code, an appeal against conviction on a question of law can be made without leave, and an appeal against conviction on a question of fact with leave of the court, and an appeal against sentence also with leave. The Criminal Code expressly provides that the Court of Appeal must allow the appeal if the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, if the judgement was wrong in law, and if a miscarriage of justice occurred.

4.13 As regards the author's claim that he was not present at the appeal hearing, although he had indicated that he desired to be, the State party refers to the Committee's General Comment 13 (adopted at the Committee's twenty-first session) where it is explained that article 14, subparagraph 3 (d), means that "the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all the available defences and the right to challenge the conduct of the case if they believe it unfair". The State party argues that article 14, subparagraph 3 (d), does not contain an absolute requirement to have an accused present at the appeal, when he is being represented by counsel. The State party also submits that the author has failed to show that the interests of justice would have been better served if he had been personally present at the appeal. The State party concludes that the claim is inadmissible under article 2 of the Optional Protocol.

4.14 As regards the author's claim that he was not informed that a possibility to appeal to the High Court existed, effectively preventing him from obtaining a review by a higher tribunal, in violation of article 14, paragraph 5, the State party contends that this provision guarantees no right beyond a single appeal to a higher tribunal. The State party states that the author's representative on appeal was of the judgement that an application for special leave to appeal to the High Court would have had no prospect of success. The State party further submits that conversations between counsel and clients lie outside the scope of responsibility of the State party. Moreover, the State party points out that it has been informed by the Queensland Government that it is standard procedure to advise each client of his appeal rights to the High Court and that the appeal clerk, allocated to the author's defence on appeal at the time, recalls that the author was in fact advised of his right at the time.

4.15 As regards the author's claim under article 26, the State party argues that it is inadmissible ratione temporis. It also contends that the claim is inadmissible for lack of substantiation. In this connection, the State party submits that the acquittal of another person for a criminal offence under the Federal Customs Act cannot be relevant to the conviction of the author, since each case before the courts is judged on its own merits.

4.16 As regards the author's claim under article 16 of the Covenant, the State party argues that the facts of the case do not raise an issue under this article, since the author exercised the same legal rights as any other individual brought before a court in Australia.

4.17 As regards the author's complaint that he lost six tapes (with German translations of English original tapes) when being transferred from one prison to another, and that he has not received sufficient compensation, the State party explains that the compensation paid was based on the cost to the author to have these tapes translated. The State party argues that the claim is inadmissible ratione temporis, because the tapes were lost some time before 26 June 1991, i.e. before the entry into force of the Optional Protocol for Australia, and that no continuing effects exist which in themselves constitute a violation of the Covenant. The State party moreover submits that this complaint made by the author does not raise an issue under the Covenant and that he has failed to exhaust domestic remedies in respect to his allegation.

5.1 By letter of 1 March 1996, the author comments on the State party's submission. He argues that his communication is admissible ratione temporis because the events of which he complains have continuing effects, since he is still in prison.

5.2 As to the length of his pre-trial detention, he maintains that this constituted a violation of his rights under article 9, paragraph 3, and article 14, paragraph 3 (c), and argues that the shorter sentence imposed by the judge does not remedy the violations.

5.3 As to his claim under article 10 of the Covenant, the author refers to newspaper articles describing the situation in Australia's prisons, and adds that he was never taken seriously by the prison system. He reiterates that he was forced to stand trial while sick.

5.4 As regards his claim that he didn't have enough time and facilities in preparation for his defence, the author states that no lawyer came to visit him after the committal hearing on 22 September 1989 until 11 days before the beginning of the trial in March 1990. He submits that he therefore had only 11 days to prepare for his defence and that this was not adequate. The author further claims that under article 14, subparagraphs 3 (b) and (d), he has a right to choose his own counsel provided to him without payment.

5.5 As to the interpretation during the trial, the author maintains that he did not understand everything that was going on during the trial, despite the judge's directions to the interpreter and despite the interpreter's qualifications. He further submits that if his appeal counsel would have consulted him better he would certainly have been able to advance arguments in support of the ground of appeal.

5.6 As regards his claims under articles 16 and 26 of the Covenant, the author refers to his original communication and reiterates his arguments. He further refers to publications illustrating the level of corruption in Queensland and argues that deals between the police, judiciary and Lebanese drug syndicates are being made regularly.

5.7 In respect to the lost tapes, the author states that no further domestic remedies exist in practice, since it is beyond anybody's means to seek review in the Supreme Court. He maintains that the compensation received does not cover the costs of the tapes.

State party's further submission and author's comments thereon

6.1 In September 1996, the State party reaffirmed its view that the communication is inadmissible. It reiterated that the author's claim concerning the medical treatment at Brisbane Correctional Centre (BCC) is inadmissible ratione temporis since he was detained there only from June 1989 to September 1989. The State party adds that part of the BCC was closed in

November 1989, and the whole in July 1992, following a recommendation to that effect by the Commission of Review into Corrective Services in Queensland.

6.2 As regards the author's lost tapes, the State party maintains that available domestic remedies in the form of judicial review have not been exhausted by the author. It explains the procedure of review and rejects the author's assertion that a review to the Queensland Supreme Court would be too costly, since only a filing fee of $154 is required. Moreover, an applicant can request the Court for an order regarding the costs, if he does not have the necessary resources. If the author had availed himself of the remedy, the Court could have remitted the matter for further consideration and higher compensation awarded if that had been lawful and appropriate.

7. In his comments, the author explains that an application for review to the Queensland Supreme Court, concerning the compensation for the lost tapes, is no longer possible because the deadline for filing such an application has expired. He states that he was not informed by the authorities at the time that he could file such application. He adds a decision by the Supreme Court in a review application submitted by another prisoner, which, according to the author, shows that this avenue is without prospect.

8. Both State party and author inform the Committee that, following the author's release on parole, he has left Australia and now resides in Germany. The author adds that he maintains his communication.

Issues and proceedings before the Committee

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 As to the duration of the author's pre-trial detention - nine months - the Committee notes that this lasted from 5 June 1989 to 4 March 1990 and thus occurred prior to the entry into force of the Optional Protocol for Australia. This claim is, accordingly, inadmissible *ratione temporis*, insofar as it relates to article 9, paragraph 3, and article 14, subparagraph 3 (c).

9.3 As to the author's claim that he did not receive adequate medical treatment during his pre-trial detention, in violation of article 10, paragraph 1, the Committee also notes that this occurred before March 1990, i.e. once again before the entry into force of the Optional Protocol for Australia. This claim, therefore, is also inadmissible *ratione temporis*.

9.4 As regards the author's claim that he was denied the right to communicate with counsel of his own choosing, the Committee notes that the author was represented by counsel from the beginning, first by a privately retained lawyer and subsequently by different legal aid lawyers. The Committee recalls that article 14, subparagraph 3 (d), does not entitle an accused to choose counsel provided free of charge. As regards article 14, subparagraph 3 (b), the author has not indicated that he was ever denied access to a counsel with whom he wished to communicate. The Committee considers therefore that the author has advanced no claim under article 2 of the Optional Protocol and that this part of the communication is accordingly inadmissible.

9.5 As regards the author's claim that he did not have adequate time and facilities for the preparation of his defence, the Committee notes that nothing in the information submitted by the author indicates that he ever complained before or during the trial to counsel or to the court that he had not had enough time and facilities to prepare his defence, nor did his counsel inform the court that he was not ready to present the defence. The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim and that this part of the communication is equally inadmissible under article 2 of the Optional Protocol.

9.6 As regards the author's claim under article 14, subparagraph 3 (a), the Committee notes that, although the author has invoked this provision, he has not adduced any facts in support of his contention that he was not promptly informed and in detail in a language which he understands of the nature and cause of the charge against him. This part of the communication is inadmissible under article 2 of the Optional Protocol.

9.7 As regards the author's allegation that the quality of the interpretation was poor and that this prejudiced him in his defence, the Committee notes that the trial transcript shows that the judge regularly intervened in the hearing of witnesses in order to facilitate the work of the interpreter. The State party further has shown that the interpreter during the author's trial had full professional qualifications. Article 14, subparagraph 3 (f), obliges States parties to provide the free assistance of a competent interpreter if an accused cannot understand or speak the language used in court. In the instant case, such an interpreter was provided by the State party, and the Committee notes that the record does not show any problems with the interpretation. In the circumstances, this part of the communication is inadmissible under article 2 of the Optional Protocol.

9.8 As regards the author's claim that the failure to call witnesses on his behalf constitutes a violation of article 14, subparagraph 3 (e), the Committee notes that the defence was free to call any witness, but that the author's counsel, exercising his professional judgement, chose not to do so. The Committee considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interest of justice. In the instant case, there is no reason to believe that counsel was not using his best judgement, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

9.9 As regards the author's claims that he is a victim of a violation of articles 26 and 16 of the Covenant, the Committee notes that each criminal case is to be examined on its own merits and that the acquittal of one accused and the conviction of another as such do not raise issues of recognition as a person or of equality before the law. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

9.10 As regards the author's claim under article 14, paragraph 5, the Committee notes that the author's appeal with regard to both conviction and sentence was in fact heard and the evidence reviewed by the Court of Appeal. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

9.11 As regards the appeal to the High Court, the Committee observes that, once a further appeal has been provided by law, the guarantees of article 14 apply and the convicted person thus has a right to make use of this appeal. In the instant case, the Committee notes that the author has not substantiated, for purposes of admissibility, his claim that he was denied his right to appeal to the High Court. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

9.12 Finally, the Committee considers that the issue of the tapes with German translations of English original tapes of the trial, which were lost during a prison transfer, does not raise any issue under the Covenant. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

10. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the State party and to the author.

B. Communication No. 593/1994: Patrick Holland v. Ireland (Decision of 25 October 1996, fifty-eighth session)

Submitted by: Patrick Holland

Victim: The author

State party: Ireland

Date of communication: 8 June 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 1996,

Adopts the following:

Decision on admissibility

1. The author of the communication is Patrick Holland, an Irish citizen, born on 12 March 1939, at the time of submission of the communication serving a prison term in Ireland. He claims to be a victim of a violation by Ireland of articles 14 and 26 of the Covenant. Both the Covenant and the Optional Protocol entered into force for Ireland on 8 March 1990.

Facts as submitted by the author

2.1 The author was arrested on 6 April 1989 under section 30 of the Offences against the State Act 1939 and charged with possession of explosives for unlawful purposes. He was tried on 27 June 1989 by a Special Criminal Court, together with four co-defendants, found guilty and sentenced to 10 years' imprisonment. On appeal against sentence, the Court of Appeal, on 21 May 1990, reduced the sentence to seven years' imprisonment, considering that the judgement of the Special Court might give the impression that he was convicted of a more serious charge, namely of possession of explosives for enabling others to endanger life. The author was released from prison on 27 September 1994.

2.2 At the trial before the Special Criminal Court, the author pleaded guilty of the charge, allegedly because his lawyer had told him that "in this court, they are going to believe the police" and that his sentence would be heavier if he would plead not guilty. In this context, the author states that one of his co-accused who pleaded not guilty was indeed sentenced to a longer term of imprisonment.

2.3 The author submits that there was no evidence against him, but that the police claimed that he had admitted to them that he knew about the explosives in his house. No tape recording of the author's alleged confession was provided; he did not sign any confession.

2.4 The author explains that in April 1989, an acquaintance of his, A. M., stayed with him in his house, having come from England to inquire into the possibilities of renting a restaurant or pub. On 3 April 1989, they were joined by P. W., a friend of A. M., who had come to Dublin to attend a court hearing. The author states that he did not know P. W. before, but that he allowed him to stay at his house. The author, who had his own printing business, worked most of the time, only coming home to sleep or eat. At lunchtime on 6 April 1989, the police raided his house, and arrested him, A. M. and P. W. and a fourth acquaintance, a former colleague, who was visiting the author. Explosives were found in a black bag, but the author denies having had knowledge of their presence.

Complaint

3.1 The author claims that the trial against him was unfair, because the Special Criminal Court does not constitute an independent and impartial tribunal, in violation of article 14, paragraph 1, of the Covenant. In this connection, the author explains that the Irish Constitution permits the establishment of "special courts" for the trial of offences in cases where it is determined that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. The author points out that it is the Government who decides which cases are to be brought before a special court. The author quotes from section 39 of the Offences against the State Act, which provides that members of special courts are appointed and removed at will by the Government. The remuneration, if any, is determined by the Ministry for Finance. Members of special courts need not be members of the judiciary; barristers and solicitors of at least seven years' standing and high ranking officers of the Defence Forces may also be appointed.

3.2 The author contends that the special courts represent a threat to the equality of treatment of those accused of crimes, because the independence of the members of such courts is not protected. In this context, the author refers to the judgement in his case, which appeared to sentence him for a more serious offence than that for which he had been charged.

3.3 The author further alleges that he was discriminated against in the prison system because he "fought for his rights" through the courts in order to have his proper entitlement to parole established. He states that two of his co-accused, who received the same sentence, were moved to an open prison in 1992 and early 1993, whereas the author was only moved to an open prison in the beginning of 1994. The author points out that regular weekend home visits are allowed from an open prison, whereas he was unable to obtain permission to visit his sister in hospital before she died on 22 December 1993; he was granted parole from 22 to 27 December 1993, after she had already died.

State party's submission and the author's comments

4.1 By submission of 5 December 1994, the State party argues that the communication is inadmissible ratione temporis, since the substance of the author's complaint relates to his trial in the Special Criminal Court on 27 June 1989, that is before the entry into force of the Covenant and its Optional Protocol for Ireland.

4.2 The State party further argues that the communication is inadmissible for failure to exhaust domestic remedies. The State party notes that the essence of the author's claim is that he did not receive a fair trial before an independent and impartial tribunal and that he claims that he was innocent of the offences with which he was charged. However, the author withdrew his plea of not guilty, leaving the trial court with no option but to accept his acknowledgement and sentence him accordingly. The State party submits that he might have been acquitted, had he pleaded not guilty. It contests the author's suggestion that persons tried in the Special Criminal Courts are invariably convicted.

4.3 The State party further submits that the author failed to request the judges of the Special Court to disqualify themselves on the grounds that they were not independent and impartial. In this connection, the State party notes that the author, in fact, has not alleged any bias against the judges of the court which tried him. His argument seems to be that by virtue of the method of appointment and dismissal of the members of the Court a lack of independence and impartiality could arise, not that it did.

4.4 The State party explains that the Special Court is subject to control through judicial review by the High Court. A person who alleges a breach of the Constitution or of natural justice can seek an order from the High Court quashing a decision by the Special Criminal Court or prohibiting it from acting contrary to the Constitution or to the rules of natural justice. If the author would have had reason to argue that he had not received a fair trial in the Special Court, he could therefore have sought an order of judicial review from the High Court, which he failed to do.

4.5 In this context, the State party refers to the Supreme Court's decision in the Eccles case,[1] where it was held that the Government could not lawfully terminate the appointment of individual members of the Special Court for disagreeing with their decisions. The Court found that whereas the express constitutional guarantees of judicial independence did not apply to the Special Court, it enjoyed a derived guarantee of independence in carrying out its function.

4.6 The State party also argues that it would have been open to the author to argue at the hearing of his appeal that his conviction was defective by reason of lack of independence of the judges. The State party notes that the author, however, failed to appeal against his conviction and made no allegation that the Special Court was biased or lacked independence.

4.7 Further, the State party argues that the author has not shown that he is personally a victim of the violation alleged. The State party refers to the author's argument that under the applicable legislation the independence of the court cannot be guaranteed. The State party submits that this is an argument of an actio popularis, since the author does not argue that the judges who tried him did in fact lack independence or that they were biased against him, nor does he specify any shortcoming in the proceedings. In this context, the State party refers to the decision by the European Commission on Human Rights in the Eccles case,[2] which found that the Special Court was independent within the meaning of article 6 of the European Convention.

4.8 The State party explains that article 38 of the Constitution provides that special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. The Offences against the State Act, 1939, provides for the establishment of such special courts, if the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and publishes a proclamation accordingly. Any such Government proclamation may be annulled by resolution of the Lower House of Parliament. A Special Criminal

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[1] Eccles v. Ireland [1985] I.R. 545.

[2] Eccles e.a. v. Ireland, Application No. 12839/87, decision of 9 December 1988.

Court was first established in 1939 and remained in existence until 1962. In 1972, owing to the situation arising from the troubles in Northern Ireland, the Special Criminal Court was re-established.

4.9 Section 39 of the Offences against the State Act regulates the appointment of members to the Court. The State party underlines that with few exceptions the members of the Special Criminal Court since 1972 have been judges of ordinary courts at the times of their appointment, and that since 1986 the Court has been comprised only of serving judges. No members of the Defence Forces have been appointed to the Court since its establishment in 1972.

4.10 Section 40 of the Act provides that the determination of the Special Criminal Court is to be according to the opinion of the majority and that individual opinions are not to be disclosed. Pursuant to section 44 of the Act convictions or sentences of a Special Criminal Court are subject to appeal to the Court of Criminal Appeal in the same way as convictions and sentences of the Central Criminal Court. There are no rules of evidence applying to the Special Criminal Court which do not apply to the ordinary courts, apart from provisions permitting the taking of evidence on commission in Northern Ireland.

4.11 Finally, the State party informs the Committee that the Court before which the author was tried consisted of a judge of the High Court, a judge of the Circuit Court and a District Justice. The State party adds that it is not aware of any challenge to the members' personal impartiality and independence.

5.1 On 8 February 1995, the author provided his comments on the State party's submission. He reiterates that members of the Special Court can be dismissed at will by the Government and that there is therefore no guarantee for their independence and impartiality.

5.2 As to the State party's argument that his communication is inadmissible for non-exhaustion of domestic remedies because he withdrew his plea of not guilty, the author explains that after he had pleaded not guilty, his barrister asked the Court for a short recess. He then came to see him and advised him to plead guilty, since he was before the Special Criminal Court and a not guilty plea would result in a 12 years' sentence. Consequently, he pleaded guilty.

5.3 As regards the State party's argument that he failed to ask the judges of the trial court to disqualify themselves, that he failed to have the trial proceedings quashed by judicial review and that he failed to appeal against his conviction or to raise the alleged lack of independence of the court as a ground of appeal, the author states that he could not have done any of these things because his own defence counsel had already told him to plead guilty and he himself had not yet learned about United Nations human rights treaties. The author recalls that as a layman he was depending on his legal advisers, who let him down and never raised these issues. In this connection, the author states that he knows of a lot of people who stood up and did not recognize the court and then were sentenced for that alone.

Further submission from the State party

6.1 Upon request of the Committee, the State party, in a further submission of 2 July 1996, comments on the admissibility of the author's claim that he had been discriminated against in the prison system, and explains the legislation and practice surrounding the decision to bring the author's case before the Special Criminal Court.

6.2 As regards the author's claim that he is a victim of discrimination, the State party confirms that the two co-accused who were sentenced to six years' imprisonment were moved to an open prison prior to the completion of their sentences and that the author and one other co-accused remained in a closed institution until their release. The State party explains further that the co-accused moved to an open prison received the standard 25 per cent remission of their sentences and were released about six months early. The third co-accused spent the duration of his sentence in a high security facility and was released 36 days prior to his release date.

6.3 The State party explains that the author was considered for a transfer to an open prison, but that, since the author had friends and relatives in Dublin, and all the open facilities were outside the Dublin area, it was decided that it would be better if he stayed in a closed institution in Dublin. The author was offered early release from 27 June 1994, that is three months prior to his release date. However, he declined to leave prison as he had nowhere to live. He was subsequently released on 22 September 1994, four days early.

6.4 The State party submits that transfers from a closed to an open prison are benefits accorded certain prisoners on the basis of their records, home addresses and other relevant considerations, but that it is not a right to which all prisoners are equally entitled. Reference is made to the Judgment of the European Court of Human Rights in the Ashingdane case (14/1983/70/106).

6.5 It is further submitted that the author was not treated differently from others, but that the decision to keep the author in a closed institution in Dublin was taken, as were the decisions to transfer two of his co-accused to an open institution outside Dublin, by reference to their personal and family circumstances and were intended to facilitate communication between the detainees and persons close to them. Moreover, it is submitted that, might the Committee nevertheless find that the author was treated differently, this treatment was based on reasonable and objective criteria and did not amount to discrimination.

6.6 The State party argues that the communication is inadmissible under article 3 of the Optional Protocol, for being incompatible with the provisions of the Covenant. Further, it is argued that the author's claim is inadmissible for non-exhaustion of domestic remedies, since it was open to the author to seek judicial review of the order made by the Minister of Justice to transfer him to Whatefield Detention Centre in Dublin and not to an open prison. It was also open to the author to institute proceedings for alleged breach of constitutional rights, since the Constitution in article 10.1 protects the right of all citizens to be held equal before the law. It is submitted that the author never availed himself of any of the remedies open to him.

7.1 As regards the procedures of deciding whether a case will be tried before a Special Criminal Court, the State party explains that the Director of Public Prosecutions decides in accordance with law whether a case will be tried by the ordinary Criminal Courts or by the Special Criminal Court under part V of the Offences against the State Act. The Director is independent of the Government and the police in the discharge of his functions. The Offences against the State Act provides for certain offences to be scheduled under that Act. Where a person is charged with a scheduled offence, the Director of Public Prosecutions, under section 47(1) of the Act, may have that person brought before the Special Criminal Court to be tried on such offence. The author was charged with possession of explosive substances for an unlawful object, a scheduled indictable offence in accordance with section 47(1) of the Act.

7.2 A panel of nine judges, appointed by the Government and all being judges of the High Court, Circuit Court or District Court, is available to hear cases in the Special Criminal Court. The designation of members to hear a case is exclusively a matter for the judges of the panel to decide. The State party strongly refutes any suggestion that the judges of the Special Criminal Court lack independence or would have been biased against the author.

7.3 The State party explains that the decision to charge the author with the offence in question, as well as the decision to refer the author's case to the Special Criminal Court, was based on an assessment of the available evidence that was made known to the Director of Public Prosecutions by the Irish police.

7.4 The State party explains that the institution of the Special Criminal Court can be challenged since it is subject to constitutional scrutiny. It is also possible to challenge the constitutionality of various aspects of the legislation relating to the Special Criminal Court. Several such challenges have been undertaken. The author however did not attempt to initiate any proceedings in this respect.

7.5 The State party explains that it is also possible to challenge the referral of a case to the Special Criminal Court through judicial review of the Director of Public Prosecutions' decision. However, the relevant case law all relates to situations where the accused had been charged with a non-scheduled offence and the Director decided that he or she be tried before the Special Criminal Court. In availing himself of this remedy, the author would have had to show that the Director of Public Prosecutions had acted with mala fides.

7.6 The State party reiterates that the communication should be declared inadmissible.

Author's comments on the State party's submission

8.1 In his comments on the State party's submission, the author emphasizes that his main complaint is that the Special Criminal Court was illegal, because it was set up without making an application under article 4, paragraph 3, of the Covenant. He contends that there is no escaping a conviction before the Special Court and reiterates that when he pleaded not guilty, his solicitor told him that his sentence would be lower with a guilty plea, upon which he changed his plea.

8.2 The author reiterates that he was not allowed to leave prison in time to visit his dying sister in December 1993, but that he was only given leave after she died, to attend her funeral.

Issues and proceedings before the Committee

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has taken note of the State party's argument that the communication is inadmissible ratione temporis. The Committee refers to its prior jurisprudence and reiterates that it is precluded from considering a communication if the alleged violations occurred before the entry into force of the Covenant for the State party concerned, unless the alleged violations continue or have continuing effects which in themselves constitute a violation. The Committee notes that, although the author was convicted and sentenced at first instance in June 1989, that is before the entry into force of the Covenant for Ireland, his appeal was dismissed on 21 May 1990, that is after the entry into force of the Covenant for Ireland, and his imprisonment lasted until August 1994. In the circumstances, the Committee is not precluded *ratione temporis* from considering the author's communication.

9.3 As regards the author's claim that he did not receive a fair trial because he was tried before a Special Criminal Court, which was established in violation of article 14 of the Covenant, the Committee notes that the author pleaded guilty to the charge against him, that he failed to appeal his conviction, and that he never raised any objections with regard to the impartiality and independence of the Special Court. In this context, the Committee notes that the author was represented by legal counsel throughout and that it appears from the file that he made use of his right to petition the High Court with regard to other issues but did not raise the aforesaid issue. In the circumstances, the Committee finds that the author has failed to fulfil the requirement of article 5, subparagraph 2 (b), of the Optional Protocol, to exhaust available domestic remedies.

9.4 As regards the author's claim that he was discriminated against because he was not transferred to an open prison at the same time as his co-accused, the Committee notes that the State party has argued, and the author has not denied, that it would have been open to the author to seek judicial review of this decision. In the circumstances, the Committee considers that this claim is also inadmissible under article 5, subparagraph 2 (b), of the Optional Protocol, for non-exhaustion of domestic remedies.

10. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the State party and to the author.

C. Communication No. 601/1994; E. Julian and C. M. Drake v. New Zealand (Decision of 3 April 1997, fifty-ninth session)*

Submitted by: Evan Drake and Carla Maria Drake

Victims: The authors
and the "New Zealand Veterans"

State party: New Zealand

Date of communication: 20 February 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1997,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Evan Julian and Carla Maria Drake (née Driessen), New Zealand citizens, who submit the communication on their own behalf and on that of New Zealand citizens and residents incarcerated during the Second World War by the Japanese, or widows and children of those (hereafter the "New Zealand Veterans"). They claim to be victims of a violation by New Zealand of article 2, subparagraph 3 (a), and article 26 of the International Covenant on Civil and Political Rights. They are represented by Mr. H. C. Zeeman, Chairman, and Mr. E. W. Gartrell, Deputy Chairman of the New Zealand Action Committee ex-Japanese War Victims.

Facts as submitted by the authors

2.1 Ms. Drake was born on 6 September 1941 on Sumatra of Netherlands parents. She immigrated to New Zealand with her parents in 1958. She became a naturalized New Zealand citizen in 1964. In 1942, when she was seven months old, she was incarcerated with her mother, her sister and two brothers in an internment camp at Brastagi, Sumatra. In July 1945 she was moved to a camp at Aek Paminke, also in Sumatra. When the camp was liberated in October 1945, she was suffering from severe malnutrition, had never walked and had suffered from serious infectious diseases, including dysentery, jaundice, whooping cough and diphtheria, none of which had been treated; she was covered with sores, some of which left scars that are still visible today. After liberation, the camp stores were found to contain a large number of Red Cross parcels containing food and medicines. The author submits that the terrible effects of her experiences of the first four years of her life, of which she later learned more details through a diary that her mother had kept while interned, were a blight on her childhood and teenage years and still affect her to the present day.

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* The following members of the Committee participated in the examination of the communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin and Mr. Danilo Türk.

2.2 The second author, Mr. Evan Julian Drake, was a fighter pilot with the Royal Air Force in Hurricane Squadron 232. He fought in Singapore, Sumatra and Java. After his capture by the Japanese, he was transported by cargo ship from Batavia to Singapore, then to Saigon, Formosa (where he stayed 18 months), Japan, Korea and Mukden in Manchuria. He states that the conditions of both his internment and of the shipping from one location to another (packed on shelves, no hygiene, fed on slush, no air and dozens of men dying per day) were sheer horror. He states that he still suffers from the effects and that he is half crippled.

2.3 The authors submit that, after the surrender of the Dutch East Indies, the New Zealand Veterans were incarcerated by the Japanese in three major groups, members of the armed forces, civilian males from age 10 up and females and children. The authors submit that the conditions in the Japanese camps were inhuman. Maltreatment and torture took place regularly. Prisoners were forced to march long distances under hard conditions, many of those dropping out being killed by the guards. They were forced to do slave labour in tropical heat without protection against the sun. Lack of housing, food and medical supplies led to diseases and deaths. In this context, reference is made to the judgement of the International Military Tribunal for the Far East of November 1948, which deals with the atrocities committed in the camps (pages 395-448), and which found that it was general practice and indeed policy of the Japanese forces to subject the prisoners of war and civilian internees to serious maltreatment, torture and arbitrary executions, in flagrant violation of the laws of war and humanitarian law.

2.4 In August 1945, following the Japanese surrender to Allied Forces, the horrific fate of the Far East prisoners of war was fully discovered. The New Zealand Veterans had been imprisoned by the Japanese in indescribable conditions with hardly any food, little or no protection against the elements, only the medical care they could improvise themselves and exposed to all manner of tropical and other diseases. The vast majority had been used as forced slave labour on road and airfield construction. Some had been used for medical experimentation in Mukden. Many had been transported in inhumane and unsanitary conditions by sea to Japan to work on the docks, the shipyards and in coal and copper mines.

2.5 As a consequence of the barbaric conditions in the camps, the released prisoners were in bad physical condition, suffered severely from malnutrition with vitamin deficiency diseases such as beri-beri and pellagra, malaria and other tropical diseases, tuberculosis, tropical sores and the effects of physical ill-treatment. It is submitted that as a direct consequence, the New Zealand Veterans still suffer significant residual disabilities and incapacities.

2.6 Although the Peace Treaty of 1952 between Japan and the Allied Forces ultimately resulted in certain nominal indemnification for the New Zealand Veterans, this indemnification did not include appropriate compensation for the slave labour and gross violations of human rights experienced by them.

2.7 The authors indicate that, in 1987, the New Zealand Action Committee for Ex-Japanese War Victims submitted a claim to the United Nations Commission on Human Rights, in accordance with the procedure established by Economic and Social Council resolution 1503 (XLVIII), with respect to the gross violations of human rights committed by Japan in relation to the incarceration of the New Zealand servicemen and civilian internees held as prisoners of war. In 1991, the Subcommission on Prevention of Discrimination and Protection of Minorities concurred with the interpretation of its Working Group on Communications that "the procedure governed by Economic and Social Council resolution 1503 (XLVIII) could not be applied as a reparation or relief mechanism in respect of claims of compensation for human suffering or other losses which had occurred during the Second World War".

2.8 The authors claim that they have exhausted all domestic remedies. It is submitted that following many years of attempted negotiations to obtain compensation for New Zealand veterans, it has remained the consistent position of the Government of New Zealand that any reparation to be paid to New Zealand prisoners of war and civilian internees was provided for in the Peace Treaty with Japan.

2.9 The authors reiterate that the Peace Treaty did not encompass the damages suffered by the veterans under the conditions of imprisonment imposed by the Government of Japan during the war and, more particularly, that the Peace Treaty did not address the question of indemnification for the gross violations of human rights and slave labour. It is further submitted that as a matter of law the Government of New Zealand had no legal authority or mandate to waive their rights to a remedy for the gross violations of their rights. In support of this argument, the authors refer to the Hague Convention of 18 October 1907, the Third Geneva Convention of 1949, Protocol I of the Geneva Convention and the legal commentaries prepared by the International Committee of the Red Cross (ICRC), as well as to the study concerning the right to reparation for gross violations of human rights presented to the Subcommission on Prevention of Discrimination and Protection of Minorities by Mr. Theo van Boven.

Complaint

3.1 The authors argue that the New Zealand Veterans still suffer substantial physical, mental and psychological disability and incapacity caused by their incarceration. These residual disabilities and incapacities continue to the current day, have had a devastating impact on the lives of the New Zealand veterans and will remain a permanent concern for these individuals and their families. In this context, reference is made to the Canadian Pension Commission "Report of a Study of Disabilities and Problems of Hong Kong Veterans 1964-1965", the conclusions of which are said to be applicable to all former prisoners of war and civilian internees incarcerated by Japan. Further reference is made to a report prepared by Professor Gustave Gingras, entitled "The sequelae of inhuman conditions and slave labour experienced by members of the Canadian Components of the Hong Kong Forces, 1941-1945, while prisoners of the Japanese Government", which outlines the nature and severity of the residual disabilities and incapacities at present being experienced by the Hong Kong veterans and other allied prisoners of war and civilian detainees.

3.2 The authors argue that the actions of the Government of New Zealand in entering into the 1952 Peace Treaty with Japan and releasing the Japanese from further reparation obligations is in clear violation of international law and continues to have ongoing effects on the fundamental rights of New Zealand veterans. In this context, it is stated that the Government of New Zealand has expressly relied on the Peace Treaty as a basis for its lack of support for the claim of compensation for New Zealand veterans in international forums. It is submitted that the continued acts of the New Zealand Government in this regard have resulted in a deprivation of the "right to a remedy" enshrined in article 2, subparagraph 3 (a), of the Covenant.

3.3 The authors further claim that the Government of New Zealand has through its actions discriminated against the New Zealand Veterans in violation of article 26 of the Covenant, since it has failed to provide appropriate financial assistance and compensation for the residual disabilities and incapacities suffered by the authors.

State party's submission on admissibility and authors' comments thereon

4.1 By submission of 30 January 1995, the State party argues that the communication is inadmissible ratione materiae and ratione temporis.

4.2 As regards the authors' allegation that by entering into the Peace Treaty with Japan, the Government of New Zealand has deprived them of a remedy, in violation of article 2, subparagraph 3 (a), the State party observes that the Human Rights Committee has decided that this article can only be invoked in conjunction with an alleged breach of a substantive right guaranteed by the Covenant, and that the right to a remedy only arises after a violation of a Covenant right has been established.[3] Although the authors do also claim a violation of article 26 of the Covenant, they do not claim that they have been deprived of a remedy for the breach of article 26, but invoke article 2, paragraph 3, independently. The State party thus submits that this claim is inadmissible as being incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

4.3 As regards the authors' claim that the failure of the Government to provide a remedy for the injustices suffered by the authors during their incarceration by Japan and for the residual disabilities and incapacities is in violation of article 26 of the Covenant, the State party refers to the Committee's definition of discrimination.[4] The State party submits that the authors have not indicated how they are treated differently to other New Zealand citizens, how they have been singled out or how they have been treated differently to other war veterans in relation to the receipt of war pensions or in access to health services. In this context, the State party explains that war pensions (for disablement or death while on service), veterans pensions (for those who suffered significant disability as a result of war service) and special allowances are available to all veterans who were resident in New Zealand at the outbreak of the Second World War. Further, all citizens have access to the public health system.

4.4 The State party also observes that the Committee has held that article 26 does not of itself contain any obligation with respect to the matters that may be provided for by legislation.[5] The State party notes that the authors allege that the Government has discriminated against them by not providing financial assistance and compensation, but that they do not allege that any discriminative legislation has been passed, nor have they substantiated in what manner administrative action may have amounted to discrimination. The State party thus argues that the authors have failed to put forward a prima facie case. The State party contends that the authors' claim under article 26 is inadmissible for being incompatible with the provisions of the Covenant and for lack of substantiation.

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[3] The State party refers to the decisions of the Committee in Communications Nos. 268/1987 (M. G. B. and S. P. v. Trinidad and Tobago) and 343, 344 and 345/1988 (R. A. V. N. et al. v. Argentina).

[4] General Comment No. 18, para. 6.

[5] Committee's Views in Communication No. 172/1984 (Broeks v. The Netherlands), para. 12.4.

4.5 Finally, the State party refers to the Committee's jurisprudence that it is only competent to consider alleged violations which occurred on or after the date of entry into force of the Optional Protocol for the State party concerned.[6] In this context, the State party explains that it signed the Peace Treaty with Japan in September 1951, that the Covenant entered into force for New Zealand on 28 March 1979, and the Optional Protocol on 26 August 1989. As to the authors' argument that the signing of the Peace Treaty has continuing effects, the State party argues that the authors have not demonstrated that the consequences constitute in themselves a violation of the Covenant. In this context, the State party notes that the authors have not cited any action of the Government after the entry into force of the Optional Protocol for New Zealand in support of their allegation of continuing violations. The State party therefore submits that the communication is inadmissible ratione temporis.

5.1 In their comments on the State party's submission, the authors submit that discrimination of civilian detainees of the Imperial Japanese Army exists since war pensions are only provided for service personnel and their dependants. They further submit that discrimination exists of veterans who were incarcerated by Japan, since military personnel incarcerated by Germany received ex gratia payments by the Government of New Zealand in 1988, whereas no such payment has been made available to those in Japanese incarceration.

5.2 The authors further point out that those veterans who did not live in New Zealand at the outbreak of the Second World War are excluded from war pensions and that war pensions are available only for narrowly defined specific forms of disability.

5.3 As regards the definition of discrimination, the authors submit that "other status" refers to particular groups or classes in society, and therefore covers their case. In this context, the authors point out that a State party has a positive duty of protection against discrimination. The authors argue that the existing legislation discriminates against civilian detainees, since they are totally excluded from obtaining a war pension, whereas they have suffered the same treatment as military detainees. Similarly, the granting of an ex gratia payment to military detained by Germany while excluding an ex gratia payment to military detained by Japan is said to be discriminatory. In this context, the authors explain that the purported reason for the ex gratia payment was that because of the absence of a treaty or agreement with Germany, New Zealanders could not claim compensation from the Government of Germany. The authors point out that, because New Zealand concluded the Peace Treaty with Japan in 1951, they cannot claim compensation from the Government of Japan, and argue that their situation is thus similar, so that an ex gratia payment should also have been made available to them.

5.4 According to the authors, the conclusion of the Peace Treaty with Japan is discriminatory because their rights to compensation were waived, whereas otherwise they had been entitled under international law to a remedy. In this context they argue that to uphold the waiver, as the State party does by refusing to assist them in bringing their claim against Japan, is in violation of jus cogens and the principles of international law. Since the State party had no right to waive the authors' claims, the continued endorsement of the Treaty by the State party is said to constitute discrimination, depriving the authors from their right to a remedy. In this context, the authors argue that the condition for the waiver, namely the difficult situation of Japan's economy, does no longer exist.

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[6] The State party refers to the Committee's decisions concerning Communications Nos. 343, 344 and 345/1988 (R. A. V. N. et al. v. Argentina), 117/1984 (M. A. v. Italy) and 174/1984 (J. K. v. Canada).

5.5 The authors further claim that, because of their experience during the Second World War, they have different needs than ordinary citizens and that the entitlements of the public health system, to which the State party refers, do not take into account the breaches of human rights they suffered.

5.6 As regards the State party's argument that their communication is inadmissible ratione temporis, the authors refer to the Committee's jurisprudence[7] where the Committee decided that the discrimination complained of had continuing effects, and that the Committee was thus competent to examine the complaint. The authors argue that the Peace Treaty with Japan has continuing effects, since it is still in force and therefore the discrimination still exists. After the Optional Protocol was ratified by New Zealand the State party's continued inaction itself shows that the violation of the authors' rights continues.

5.7 As regards the exhaustion of domestic remedies, the authors refer to the Committee's earlier jurisprudence that litigation may not always be an effective method.[8] The authors state that they have requested the Prime Minister to address the matter, which he has refused. They argue that the refusal of support by the Government indicates that domestic remedies are non-existent and inadequate.

Further submission from the State party and authors' comments thereon

6.1 In a further submission of May 1996, the State party notes that the authors have not submitted any relevant information to substantiate their original claim that by entering into a Peace Treaty with Japan the Government violated the authors' rights under article 26 of the Covenant. In this connection, the State party explains that compensation was received by ex-prisoners of war of the Japanese pursuant to article 16 of the Treaty, in 1962 and 1963[9] and again in 1973. The State party reiterates that the claim is inadmissible for being incompatible with the provisions of the Covenant and for not having been sufficiently substantiated for purposes of admissibility.

6.2 As regards the authors' claim that it is in violation of article 26 that civilian detainees are not eligible for war pensions whereas service people and their dependants are, the State party explains that war pensions are available under the War Pensions Act 1954 to former members of the armed services regardless of the theatre of war in which they served or the nature of the service. The only civilians eligible for benefits are those who served overseas in connection with any war or emergency otherwise than as a member of the armed forces and in respect of this service was paid by the Government of New Zealand.

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[7] Committee's decisions concerning Communications Nos. 196/1985 (Gueye v. France) and R.6/24 (Lovelace v. Canada).

[8] Committee's Views in Communication No. 167/1984 (Ominayak v. Canada).

[9] According to the State party £NZ 2,943 0s 2d and £531 12s 0d was received and distributed among 114 respectively 110 ex-prisoner-of-war service personnel.

6.3 The State party notes that the distinction between members of the armed services and civilians is in no way related to the fact that the civilians may have been interned by Japan. The State party argues that the distinction that is made by the legislation is based on criteria that are reasonable and objective. In this connection, the State party explains that the War Pensions Act 1954 makes pensions available to compensate death or disablement caused by, attributable to or aggravated by war service for New Zealand overseas. They are not provided to compensate for incarceration as such. The State party submits that the authors have not put forward a prima facie breach of article 26, since it is not shown how the distinction impaired the recognition, enjoyment or exercise of any right or freedom of the civilian group.

6.4 As regards the authors' claim that article 26 has been violated because the war pensions are only offered to a narrow class of disability, the State party notes that they do not claim that the procedures and criteria are not applied equally to all. The State party argues therefore that the authors have no claim under article 2 of the Optional Protocol and refers to the Committee's jurisprudence in this regard.

6.5 As regards the authors' claim of discrimination between military personnel incarcerated by Germany and those incarcerated by Japan, the State party acknowledges that in 1987 a sum of $250,000 was appropriated to pay compensation to those prisoners of war who were held in German concentration camps. The State party explains that it took this measure because it was felt that, in the absence of a final peace treaty with Germany, the prospects of obtaining any compensation would be slight. The compensation was paid only to those who were placed in other than ordinary prisoner-of-war camps, in recognition of the unduly harsh treatment they had endured. The State party argues that the compensation available was aimed at a distinct and special group in recognition of their exceptional circumstances.[10] The State party points out that the ex-prisoners of war of the Japanese had already received compensation pursuant to article 16 of the Peace Treaty with Japan. The State party argues that the differentiation in treatment between armed services personnel incarcerated in German concentration camps and other armed service personnel incarcerated by Germany or Japan was reasonable and objective and does not amount to a violation of article 26 of the Covenant. The State party contends therefore that the claim is inadmissible as being incompatible with the provisions of the Covenant and as having been insufficiently substantiated for purposes of admissibility.

6.6 Finally, the State party notes that the payments to the ex-prisoners of war who had been incarcerated in German concentration camps were made in 1988 and that the Optional Protocol entered into force for New Zealand on 26 August 1989. The State party further notes that the authors have not claimed that the allegedly discriminatory payment has continuing effects. The State party, referring to the Committee's jurisprudence, therefore argues that the claim is inadmissible ratione temporis.

7.1 In their comments, the authors argue that the distinction between ex-prisoners of war in German concentration camps and those in Japanese camps cannot be supported on reasonable or objective grounds, but is clearly discriminatory as the circumstances in the Japanese camps were worse than those in German concentration camps, and thus just as exceptional. Moreover, the compensation excludes all civilian detainees. In this context, the authors state that the payment under article 16 of the Peace Treaty with Japan was derisory[11] in the light of the serious breaches of human rights and contrasts starkly with the ex gratia payments paid by the Government to the ex-prisoners of war in German concentration camps.

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[10] Of the more than 80 applicants, only 24 were in fact selected to receive compensation and amounts ranging from $5,000 to $13,000 were awarded to each of these.

7.2 The authors further point out that both in respect to Germany and Japan the Government was to blame for the impossibility for the victims to claim compensation directly from the State concerned, in the case of Germany because of the failure of being a party to a peace treaty, and in the case of Japan because of having concluded a peace treaty with a waiver of compensation claims. So, they claim that the compensation for only the prisoners of war in the German concentration camps and not for those in Japan entails different treatment of similar situations and thus constitutes discrimination.

7.3 Since the victims still suffer today from the effects of the harsh treatment by the Japanese, the authors claim that the breach of article 26 is ongoing in that no reparation has been made to them and in that the Government of New Zealand continues to refuse to take up their cause.

7.4 In this context, the authors explain that in Japanese camps, military service personnel and civilians were detained together and that no distinction was necessarily made between prisoner-of-war camps and concentration camps. Japanese treatment of prisoners breached the relevant international norms and conventions, as recognized by the judgement of the International Military Tribunal for the Far East. The authors argue that substantive criteria must be used to justify distinctions between classes of people, and that the State party has not advanced any, but relied only on the place of detention (Germany or Japan), instead of on the circumstances of detention (equally in violation of human rights).

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 Part of the authors' communication relates to the claim that New Zealand, in entering into the 1952 Peace Treaty with Japan, waived their right to compensation other than as provided for in the Treaty. In this connection, the Committee recalls its established jurisprudence that it is precluded from examining a communication when the alleged violations occurred before the entry into force of the Covenant. In the present case, the authors have not shown that there were any acts done by New Zealand in affirmation of the Peace Treaty after the entry into force of the Covenant that had effects that in themselves would constitute violations of the Covenant by New Zealand after that date. Further, the Committee observes that the alleged failure by New Zealand to protect the authors' right to obtain compensation from Japan cannot be regarded ratione materiae as a violation of a Covenant right. This part of the authors' communication is therefore inadmissible.

8.3 As regards the authors' claim that they are victims of discrimination because ex-service personnel who had been incarcerated in German concentration camps during the Second World War received an ex gratia payment by New Zealand in 1988, whereas the authors (civilian and ex-service) did not, the Committee notes that, although the Covenant entered into force for New Zealand in 1979, the Optional Protocol entered into force only in 1989. Having taken note of the State party's objection ratione temporis against the admissibility of this claim based on the prior jurisprudence of the Committee, the Committee considers that it is precluded from examining the authors' claim on the merits. This part of the communication is therefore inadmissible.

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[11] £15 each to 214 persons, not taking into account individual circumstances.

8.4 The authors claim that the failure of New Zealand to provide a remedy for the injustices suffered by them during their incarceration by Japan, and for their residual disabilities and incapacities, violates article 26 of the Covenant. This claim relates to the distinction said to have been made between civilian and war veterans, and between military personnel who were prisoners of the Japanese and those who were prisoners of the Germans. The authors and the groups of whom they are representatives include both civilians and war veterans.

8.5 As regards the claim that the exclusion of civilian detainees from entitlements under the War Pensions Act is discriminatory, the Committee notes from the information before it that the purpose of the Act is specifically to provide pension entitlements for disability and death of those who were in the service of New Zealand in wartime overseas, not to provide compensation for incarceration or for human rights violations. In other words if disability arises from war service it is irrelevant to the entitlement to a pension whether the person suffered imprisonment or cruel treatment by captors. Keeping in mind the Committee's prior jurisprudence[12] according to which a distinction based on objective and reasonable criteria does not constitute discrimination within the meaning of article 26 of the Covenant, the Committee considers that the authors' claim is incompatible with the provisions of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

8.6 The authors have further claimed that those who were in war service are victims of a violation of article 26 of the Covenant because of the narrow class of disability for which pensions are made available under the War Pensions Act. The Committee notes that the authors have failed to provide information as to how this affects their personal situation. The authors have thus failed to substantiate their claim, for purposes of admissibility, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the State party, to the authors and to the authors' counsel.

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[12] See, inter alia, the Committee's Views concerning Communications Nos. 172/1984 (Broeks v. The Netherlands), para. 13; 180/1984 (Danning v. The Netherlands), para. 13; 182/1984 (Zwaan-de Vries v. The Netherlands), para. 13; 415/1990 (Pauger v. Austria), para. 7.3; and 425/1990 (Neefs v. The Netherlands), para. 7.2. See also the Committee's General Comment No. 18 (Non-discrimination), para. 13.

D. Communication No. 603/1994; Andres Badu v. Canada (Decision of 18 July 1997, sixtieth session)[*]

Submitted by: Andres Badu
[represented by Mr. Stewart Istvanffy]

Victim: The author

State party: Canada

Date of communication: 11 June 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1997,

Adopts the following:

Decision on admissibility[**]

1. The author of the communication is Mr. Andres Badu, a Ghanaian citizen, at the time of submission residing in Canada, where he requested recognition as refugee. He claims to be a victim of a violation by Canada of article 2, paragraphs 1 and 3, article 6, paragraph 1, articles 7, 9, 13, 14, paragraph 1, and 26 of the Covenant. He is represented by Mr. Stewart Istvanffy, a Montreal lawyer.

Facts as presented by the author

2.1 The author, who was born on 29 November 1960, claims that he was an active member of the Ghana Democratic Movement (GDM), a group opposed to the Provisional National Defence Council (PNDC), which formed the Government in Ghana. On 14 June 1991, the author's home was allegedly searched by three security agents, who found letters pertaining to GDM activities; the author was then arrested, beaten and imprisoned and charged with possession of seditious documents. On 20 June 1991, the author was admitted to hospital to recover from his ill-treatment. With the help of his family, he escaped from hospital and went into hiding. On 30 June 1991, the author learned that he had been declared a wanted person. He subsequently left the country under disguise.

2.2 The author arrived in Canada on 8 July 1991. He requested recognition as a refugee, on the grounds that he had a well-founded fear of persecution based on his political opinion and membership of a particular social group. A hearing into his claim was held on 17 February 1992 before two commissioners of the Refugee Division of the Canadian Immigration and Refugee Board, in Montreal, Quebec. On 16 September 1992, the Refugee Division dismissed the author's claim for recognition as political refugee. Leave to appeal was granted by the Federal Court, but the appeal was dismissed by judgement of 6 January 1994.[13]

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Danilo Türk.

[**] Mr. Maxwell Yalden did not participate in the adoption of the decision, pursuant to rule 85 of the Committee's rules of procedure.

Complaint

3.1 The author claims that he has not received a fair hearing of his refugee claim, in violation of article 14, paragraph 1, of the Covenant. He argues that the two commissioners at the hearing were biased against him. He claims that one of the commissioners, a Ms. Wolfe, based herself on false and misleading information which she was given outside the meeting room and to which the author had no chance to respond. The author further submits that the other commissioner, a Mr. Sordzi, is himself from Ghana, has the same ethnic origin as Mr. Rawlings, the leader of the regime in Ghana, has publicly expressed his support for the regime in Ghana, and has acted against political refugees from Ghana in the past.

3.2 In support of his claim that Mr. Sordzi was biased, the author explains that there is a very serious ethnic conflict in Ghana, and that the military regime is dominated by the Ewe tribe, to which Mr. Sordzi belongs, whereas the author himself is an Ashanti. The author states that for these reasons Ghanaian refugees are afraid to testify before a person from Ewe origin and therefore not able to tell their full story. In this context, it is submitted that Mr. Sordzi was one of the leading members of the Concerned Ghanaians' Association, until this organization fell apart in 1988 over the issue whether or not to help Ghanaian refugees. Mr. Sordzi is said to have vehemently opposed help to Ghanaian refugees and to have opined that all so called refugees from Ghana were economic migrants. In support of his allegations, the author provides sworn statements made by Ghanaians now living in Canada.

3.3 The author further argues that the language of the decision by the Refugee Division clearly shows administrative bias against refugee claimants from Ghana. In this context, reference is made to an alleged understanding among Western nations to deny the severity of the human rights violations taking place in Ghana. In support of his claim, the author refers to a report of the Country Assessment Approach Working Group Ghana, which was the outcome of intergovernmental consultations held in Canada in 1992. Moreover, it is stated that Mr. Sordzi represented the Montreal office at a meeting of Immigration and Refugee Board's regional directors about the situation in Ghana, on 25 March 1992. The author argues that it was totally inappropriate for Mr. Sordzi to attend this meeting, in view of his personal bias. The report from that meeting is said to contain seriously wrong assessments. Commissioners allegedly have on several occasions made statements about the human rights situation in Ghana which are blatantly untrue, and regarding issues which moreover had been differently assessed by the Federal Court of Appeal.

3.4 As to the author's hearing before the two commissioners, it is alleged that he was interrogated in a very aggressive fashion and that he was frequently interrupted. He was allegedly questioned about articles in a magazine which he had never read, and which related to events of which he had no knowledge. This is said to show that the commissioners acted in bad faith.

3.5 The author further argues that the above-mentioned events and facts also amount to a violation by Canada of article 2, paragraph 1, and article 26 of the

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[13] Due to a change in the law, the author's appeal was in fact treated as an application for judicial review by the Federal Court Trial Division and denied. See further paragraphs 4.4 and 4.5.

Covenant, since he was treated in a discriminatory fashion because of his ethnic origin and political opinions.

3.6 The author further argues that many political opponents in Ghana are being sentenced to death, and that the State party, by returning him to Ghana, would place the author in a very dangerous situation which may lead to a violation of his right to life, in violation of article 6 of the Covenant. The author also contends that the deportation of an individual who has not had his claim to refugee status heard by an impartial tribunal, but by a biased one, amounts to cruel, inhuman and degrading treatment within the meaning of article 7 as well as to a violation of article 9, paragraph 1, of the Covenant. It is moreover argued that the author's expulsion would not be in pursuance of a decision reached in accordance with the law, as required by article 13 of the Covenant, because commissioner Sordzi has exceeded his jurisdiction by making decisions on the credibility of refugee claimants from Ghana.

3.7 The author claims that the Federal Court, by dismissing his appeal, has misapplied the Canadian law and thereby eliminated the only effective recourse available to the author, in violation with article 2, paragraph 3, of the Covenant.

3.8 The author states that Canadian legislation provides for a Post-Determination Review and for a Humanitarian and Compassionate Review, but claims that these remedies are devoid of substance and illusory. He claims therefore that he fulfils the requirement of article 5, subparagraph 2 (b), of the Optional Protocol.

State party's submission

4.1 By submission of 16 October 1995, the State party argues that the communication is inadmissible and provides information with regard to its refugee determination process.

4.2 The State party recalls that the author arrived in Canada on 8 July 1991 and indicated his intention to seek refugee status. He was not in possession of a valid visa, nor did he possess a valid passport, identity or travel document. On 22 August 1991, the author was found to have a prima facie claim under the Refugee Convention, and a conditional exclusion order was issued.

4.3 On 17 February 1992, two Commissioners of the Refugee Division of the Immigration and Refugee Board heard the author in order to determine whether he met the definition of Convention refugee under the Immigration Act. The State party explains that a claim succeeds if either member of the panel is satisfied that the claimant meets the definition. At the hearing, the author was represented by counsel, evidence on country conditions was presented, the author gave oral testimony and a number of exhibits were filed.

4.4 On 16 September 1992, the panel decided that there was no serious possibility that the author would be persecuted if returned to his country of nationality. The author then applied for leave to appeal to the Federal Court of Appeal. Leave was granted on 21 January 1993. On 1 March 1993, the law was changed, and the author's appeal accordingly was treated as an application for judicial review by a judge of the Federal Court Trial Division. The author based his application on errors of law and fact, including allegations of institutional bias and personal bias of the panel members who had heard his claim.

4.5 On 6 January 1994, the judge dismissed the application for judicial review. The judge found that the Board's finding on the author's credibility was within the Board's field of discretion or judgement-making. He further found that there was no evidence of partiality on the part of the members of the panel. In particular, with regard to Mr. Sordzi, the judge found that the affidavit evidence against Mr. Sordzi provided no objective corroboration or support for the allegations of bias. The judge added: "It is an aberration to suggest that Mr. Sordzi, who arrived in Canada in 1968 and became a Canadian citizen in 1976, cannot, by reason of ancestral warfare and conflict, carry out properly, objectively and judicially the duties and responsibilities which Parliament has imposed upon him."

4.6 The State party points out that the author could have appealed the judge's decision to the Federal Court of Appeal, but failed to do so.

4.7 The State party notes that other review processes were available to the author after his asylum request had been denied. He could have sought a humanitarian and compassionate review of his case under section 114(2) of the Immigration Act[14], which he failed to do.

4.8 Under the post-determination refugee claimants in Canada class (PDRCC) review process, established in February 1993, individuals determined not to be Convention refugees can apply for residency in Canada if, upon return to their country, they would face a risk to their life, of extreme sanctions or of inhumane treatment. On 5 April 1995, the author was informed that the post-claim determination officer had concluded that the author did not belong to that class of individuals.

4.9 The State party submits that the author voluntarily left Canada for Ghana on 8 June 1995.

4.10 The State party argues that the author's communication is inadmissible for failure to exhaust domestic remedies. First, because he failed to appeal the Federal Court Trial Division's decision of January 1994, in which the court dismissed his application for review based on bias of the commissioners, to the Federal Court of Appeal. Second, the author failed to seek a humanitarian and compassionate review under section 114(2) of the Immigration Act. Third, the author failed to file an application for judicial review in the Federal Court of Canada, Trial Division, of the negative PDRCC decision; the State party explains that on an application for judicial review the author could have made arguments under the Canadian Charter of Rights and Freedoms similar to the arguments made in his communication to the Committee. The author could also have challenged the constitutionality of any provision of the Immigration Act by way of declaratory action.

4.11 The State party further claims that the communication is inadmissible for failure to substantiate violations of Covenant rights. As regards the author's claims under article 6, the State party argues that the author's exclusion from Canada does not constitute a prima facie violation of his right to life, as his claims were rejected by the competent authorities and he did not make use of the possibility of judicial review against these negative decisions.

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[14] Under section 114 (2) of the Immigration Act a refugee claimant may request a humanitarian and compassionate review to see whether extraordinary circumstances warrant landing. The review includes a risk assessment and the test is one of disproportionate hardship. Judicial review of a negative decision may be sought before the Federal Court Trial Division, with leave.

4.12 As regards the author's claims under articles 9 and 13, the State party argues that these articles do not grant a broad right to asylum or right to remain in the territory of a State party. The author was allowed to stay in Canada for the purpose of having his refugee claim determined and left voluntarily following the rejection of his claim after a full hearing with possibility of judicial review. In this context, the State party refers to the Committee's Views in Maroufidou v. Sweden.[15]

4.13 As regards the author's claim under article 14, paragraph 1, of the Covenant, the State party argues that refugee proceedings are in the nature of public law and as such are not encompassed by the phrase "suit at law" in article 14 of the Covenant. In this context, the State party refers to its submissions in respect of Communication No. 236/1987 (V. R. M. B. v. Canada).[16]

4.14 Moreover, the State party argues that, even if Immigration and Refugee Board proceedings are held to constitute a "suit at law", sufficient guarantees of independence[17] exist so that it can reasonably be said to be an independent tribunal within the meaning of article 14, paragraph 1. The State party further submits that the two-member panel which decided the author's claim was impartial. In this respect, the State party notes that neither the author nor his counsel raised the issue of a reasonable apprehension of bias during the Refugee Division hearing itself. The State party also refers to the rejection by the Federal Court Trial Division of the author's allegations of bias. As regards the author's allegations of institutional bias, the State party submits that the author's case was decided on the basis of the evidence produced in the proceedings, and this evidence did not include the reports referred to by the author. The State party further argues that sufficient legal guarantees exist to exclude any legitimate doubt of the tribunal's institutional impartiality.

4.15 As to the author's claim under article 7, that his deportation amounts to cruel, inhuman or degrading treatment, because his claim had not been heard by an impartial tribunal, the State party refers to its argument above and argues that the tribunal was impartial and that the author's claim is thus inadmissible.

4.16 As regards the author's claims that he was denied equality before the law because one of the members of the panel was of Ewe ancestry, the State party submits that the allegations of denial of equality rights are without any factual or legal basis and should thus be declared inadmissible.

4.17 The State party finally argues that the Human Rights Committee is not a "fourth instance" competent to re-evaluate findings of fact or to review the application of domestic legislation, unless there is clear evidence that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. In the absence of such evidence, the State party argues that the author's claims are inadmissible.

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[15] Communication No. 58/1979, Views adopted on 9 April 1981.

[16] Declared inadmissible on 18 July 1988.

[17] Members are appointed by the Governor in Council for terms of up to seven years and drawn from all segments of Canadian society. They may only be removed on limited grounds by an inquiry procedure presided over by a judge, supernumerary judge or former judge of the Federal Court of Canada. The Immigration and Refugee Board operates autonomously and has its own budget. Decisions of the Refugee Division can be overturned in a court of law.

Issues and proceedings before the Committee

5. The deadline for counsel's comments on the State party's observations was 27 November 1995. By letter of 29 May 1997, counsel was informed that the Committee would examine the admissibility of the communication at its sixtieth session, in July 1997. No submission has been received.

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has argued that the communication is inadmissible for non-exhaustion of domestic remedies. It has also noted the contention of counsel that the post-determination review and the humanitarian and compassionate review are devoid of substance. In this context, the Committee recalls its jurisprudence that mere doubts about the effectiveness of domestic remedies do not absolve an author of the requirement to exhaust them. Further, the Committee notes that it was open to the author to appeal the decision of the Federal Court Trial Division to the Federal Court of Appeal and that judicial review was available to the author against the negative post-claim determination decision, but that he failed to avail himself of these avenues. The communication is therefore inadmissible for non-exhaustion of domestic remedies.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 5, subparagraph 2 (b), of the Optional Protocol;

(b) This decision shall be communicated to the State party and to the author's counsel.

E. Communication No. 604/1994; Joseph Nartey v. Canada (Decision of 18 July 1997, sixtieth session)[*]

Submitted by:	Joseph Nartey [represented by Mr. Stewart Istvanffy]
Victim:	The author
State party:	Canada
Date of communication:	15 June 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1997,

Adopts the following:

Decision on admissibility[**]

1. The author of the communication is Mr. Joseph Nartey, a Ghanaian citizen, at the time of submission residing in Canada, where he requested recognition as refugee. He claims to be a victim of a violation by Canada of article 2, paragraphs 1 and 3, article 6, paragraph 1, articles 7, 9, 13, 14, paragraph 1, and 26 of the Covenant. He is represented by Mr. Stewart Istvanffy, a Montreal lawyer.

Facts as presented by the author

2.1 The author, who was born on 20 February 1959, claims that he was a student activist since 1978, and that, in 1989, he became vice-president of the Takoradi Students' Union. He was a supporter of the Armed Forces Revolutionary Council (AFRC), which took power after a coup on 4 June 1979, and which is the predecessor of the Provisional National Defence Council (PNDC), the government in power at the time of the author's entrance into Canada. On 15 July 1989, the author was informed by the Minister of Education that he was selected to go and study in Bulgaria for six months. On 17 August 1989, the author left Ghana by plane, together with the other students selected for the programme. During the flight, they were informed that their destination was Libya, and not Bulgaria, and that they would undergo a six-month military intelligence training.

2.2 Upon arrival in Libya, the students' passports were confiscated and they were sent to a military training camp. They were told not to try to communicate with anyone from Ghana. After six months of training, the students were informed that they would continue their training for another 18 months. The disappointed author wrote a letter to the Takoradi Student Union in Ghana accusing the Minister of Education of being a liar, condemning the government for wasting scarce resources and warning other students not to participate in study programmes abroad. The author mailed the letter in February 1990. On that very day, he was arrested, shown the letter, kicked, and forced to sign a statement of which he did not know the contents. He was told that the Chairman of the PNDC would be informed. He then was imprisoned at the Tajuara prison in Libya.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Danilo Türk.

[**] Mr. Maxwell Yalden did not participate in the adoption of the decision, pursuant to rule 85 of the Committee's rules of procedure.

2.3 On 1 September 1991, a friend helped the author escape. It was arranged for him to leave Libya through the help of a third person, who, on 15 September 1991, put him on a plane with destination Canada.

2.4 The author arrived in Canada on 16 September 1991 and claimed recognition as a refugee immediately upon arrival. He claimed to fear for his life because of what he had witnessed in Libya, because of the opinions that he has expressed and because he had broken PNDC law. A hearing into his claim was held on 10 March 1992 before two commissioners of the Refugee Division of the Canadian Immigration and Refugee Board, in Montreal, Quebec. On 29 September 1992, the Refugee Division dismissed the author's claim for recognition as political refugee. The Refugee Division considered, inter alia, that there was no evidence that the Ghanaian Government sends forced recruits to Libya. Leave to appeal was granted by the Federal Court, but the appeal was dismissed by judgement of 20 January 1994.[18]

Complaint

3.1 The author claims that he has not received a fair hearing of his refugee claim, in violation of article 14, paragraph 1, of the Covenant. He argues that the two commissioners at the hearing were biased against him. He claims that one of the commissioners, a Ms. Wolfe, based herself on false and misleading information which she was given outside the meeting room and to which the author had no chance to respond. The author further submits that the other commissioner, a Mr. Sordzi, is himself from Ghana, has the same ethnic origin as Mr. Rawlings, the leader of the regime in Ghana, has publicly expressed his support for the regime in Ghana, and has acted against political refugees from Ghana in the past.

3.2 In support of his claim that Mr. Sordzi was biased, the author explains that there is a very serious ethnic conflict in Ghana, and that the military regime is dominated by the Ewe tribe, to which Mr. Sordzi belongs. The author states that for these reasons Ghanaian refugees are afraid to testify before a person from Ewe origin and therefore not able to tell their full story. In this context, it is submitted that Mr. Sordzi was one of the leading members of the Concerned Ghanaians' Association, until this organization fell apart in 1988 over the issue whether or not to help Ghanaian refugees. Mr. Sordzi is said to have vehemently opposed help to Ghanaian refugees and to have opined that all so-called refugees from Ghana were economic migrants. In support of his allegations, the author provides sworn statements made by Ghanaians now living in Canada.

3.3 The author further argues that the decision by the Refugee Division cannot be justified on the basis of the available evidence and that the language of the decision clearly shows administrative bias against refugee claimants from Ghana.

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[18] Due to a change in law, the author's appeal was in fact treated as an application for judicial review by the Federal Court Trial Division and denied. See further paragraphs 4.4 and 4.5.

In particular, it is stated that sufficient evidence was placed before the Division as to the Ghanaian practice to send forced recruits to Libya. In this context, reference is made to an alleged understanding among Western nations to deny the severity of the human rights violations taking place in Ghana. In support of his claim, the author refers to a report of the Country Assessment Approach Working Group Ghana, which was the outcome of inter-governmental consultations held in Canada in 1992. Moreover, it is stated that Mr. Sordzi represented the Montreal office at a meeting of Immigration and Refugee Board's regional directors about the situation in Ghana, on 25 March 1992. The author argues that it was totally inappropriate for Mr. Sordzi to attend this meeting, in view of his personal bias. The report from that meeting is said to contain seriously wrong assessments. Commissioners allegedly have on several occasions made statements about the human rights situation in Ghana which are blatantly untrue, and regarding issues which moreover had been differently assessed by the Federal Court of Appeal.

3.4 The author further argues that the above-mentioned events and facts also amount to a violation by Canada of article 2, paragraph 1, and article 26 of the Covenant, since he was treated in a discriminatory fashion because of his ethnic origin and political opinions.

3.5 The author further argues that many political opponents in Ghana are being sentenced to death, and that the State party, by returning him to Ghana, would place him in a very dangerous situation which may lead to a violation of his right to life, in violation of article 6 of the Covenant. The author also contends that the deportation of an individual who has not had his claim to refugee status heard by an impartial tribunal, but by a biased one, amounts to cruel, inhuman and degrading treatment within the meaning of article 7 as well as to a violation of article 9, paragraph 1, of the Covenant. It is moreover argued that the author's expulsion would not be in pursuance of a decision reached in accordance with the law, as required by article 13 of the Covenant, because commissioner Sordzi has exceeded his jurisdiction by making decisions on the credibility of refugee claimants from Ghana.

3.6 The author claims that the Federal Court, by dismissing his appeal, has misapplied the Canadian law and thereby eliminated the only effective recourse available to the author, in violation of article 2, paragraph 3, of the Covenant.

3.7 The author states that Canadian legislation provides for a Post-Determination Review and for a Humanitarian and Compassionate Review, but claims that these remedies are devoid of substance and illusory. He claims therefore that he fulfils the requirement of article 5, subparagraph 2 (b), of the Optional Protocol.

State party's observations

4.1 By submission of 16 October 1995, the State party argues that the communication is inadmissible and provides information with regard to its refugee determination process.

4.2 The State party recalls that the author arrived in Canada on 16 September 1991 and indicated his intention to seek refugee status. He was not in possession of a valid visa, nor did he possess a valid passport, identity or travel document. On 30 October 1991, the author was found to have a prima facie claim under the Refugee Convention, and a conditional exclusion order was issued.

4.3 On 10 March and 3 April 1992, two Commissioners of the Refugee Division of the Immigration and Refugee Board heard the author in order to determine whether he met the definition of Convention refugee under the Immigration Act. The State party explains that a claim succeeds if either member of the panel is satisfied that the claimant meets the definition. At the hearing, the author was represented by counsel, evidence on country conditions was presented, the author gave oral testimony and a number of exhibits were filed.

4.4 On 29 September 1992, the panel decided that there was no serious possibility that the author would be persecuted if returned to his country of nationality. The author then applied for leave to appeal to the Federal Court of Appeal. Leave was granted on 26 January 1993. On 1 March 1993, the law was changed, and the author's appeal accordingly was treated as an application for judicial review by a judge of the Federal Court Trial Division. The author based his appeal on errors of law and fact, including allegations of institutional bias and personal bias of the panel members who had heard his claim.

4.5 On 20 January 1994, the judge dismissed the application for judicial review. The judge found that the panel's finding was on the whole supported by the evidence. He further found that there was no evidence of partiality on the part of the members of the panel. In particular, with regard to Mr. Sordzi, the judge found that the interventions made by him did not demonstrate an unfavourable attitude towards the author. The judge also considered that the allegations against him were very general and based on affidavit evidence indicating problems between the Ewe tribe (to which he belonged) and the Ashanti and Akan tribes, whereas the author belonged to the Ga tribe. Moreover, the judge considered that neither the author nor his counsel had raised the issue of a reasonable apprehension of bias during the hearing, although they claimed before the Court that this bias was well known in the Ghanaian community.

4.6 The State party points out that the author could have appealed the judge's decision to the Federal Court of Appeal, but failed to do so.

4.7 The State party notes that other review processes were available to the author after his asylum request had been denied. He could have sought a humanitarian and compassionate review of his case under section 114(2) of the Immigration Act,[19] which he failed to do.

4.8 Under the post-determination refugee claimants in Canada class (PDRCC) review process, established in February 1993, individuals determined not to be Convention refugees can apply for residency in Canada if upon return to their country they would face a risk to their life, of extreme sanctions or of inhumane treatment. On 5 April 1995, the author was informed that the post-claim determination officer had concluded that the author did not belong to that class of individuals. On 24 April 1995, the author's counsel filed an application for leave for judicial review in the Federal Court of Canada, Trial Division. He subsequently failed to perfect the application by filing an application record with supporting affidavits. On 26 May 1995, counsel filed a demand to cease being counsel for the author, because of failure to cooperate on the author's part. On 29 August 1995, the Court dismissed the author's application for leave because of the failure to file an affidavit in time.

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[19] Under section 114 (2) of the Immigration Act a refugee claimant may request a humanitarian and compassionate review, to see whether extraordinary circumstances warrant landing. The review includes a risk assessment and the test is one of disproportionate hardship. Judicial review of a negative decision may be sought before the Federal Court Trial Division, with leave.

4.9 The State party explains that, since the author failed to leave Canada voluntarily, a deportation order was issued against him and a warrant has been issued for his arrest.

4.10 The State party argues that the author's communication is inadmissible for failure to exhaust domestic remedies. First, because he failed to appeal the Federal Court Trial Division's decision of January 1994, in which the court dismissed his application for review based on bias of the commissioners, to the Federal Court of Appeal, which he could have done without leave. Second, the author failed to seek a humanitarian and compassionate review under section 114(2) of the Immigration Act. Third, the author failed to complete his application for judicial review of the negative PDRCC decision; the State party explains that on an application for judicial review the author could have made arguments under the Canadian Charter of Rights and Freedoms similar to the arguments made in his communication to the Committee.

4.11 The State party further claims that the communication is inadmissible for failure to substantiate violations of Covenant rights. As regards the author's claims under article 6, the State party argues that the author's exclusion from Canada does not constitute a prima facie violation of his right to life, as his claims were rejected by the competent authorities and he did not complete his judicial review against these negative decisions.

4.12 As regards the author's claims under articles 9 and 13, the State party argues that these articles do not grant a broad right to asylum or right to remain in the territory of a State party. The author was allowed to stay in Canada for the purpose of having his refugee claim determined and was ordered deported only following the rejection of his claim after a full hearing with possibility of judicial review.

4.13 As regards the author's claim under article 14, paragraph 1, of the Covenant, the State party argues that refugee proceedings are in the nature of public law and as such are not encompassed by the phrase "suit at law" in article 14 of the Covenant. In this context, the State party refers to its submissions in respect of Communication No. 236/1987 (V. R. M. B. v. Canada)[20].

4.14 Moreover, the State party argues that, even if Immigration and Refugee Board proceedings are held to constitute a "suit at law", sufficient guarantees of independence[21] exist so that it can reasonably be said to be an independent tribunal within the meaning of article 14, paragraph 1. The State party further submits that the two member panel which decided the author's claim was impartial. In this respect, the State party refers to the consideration by the Federal Court Trial Division of the author's allegations of bias. As regards the author's allegations of institutional bias, the State party submits that the author's case was decided on the basis of the evidence produced in the proceedings, and this evidence did not include the reports referred to by the author. The State party further argues that sufficient legal guarantees exist to exclude any legitimate doubt of the tribunal's institutional impartiality.

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[20] Declared inadmissible on 18 July 1988.

[21] Members are appointed by the Governor in Council for terms of up to seven years and drawn from all segments of Canadian society. They may only be removed on limited grounds by an inquiry procedure presided over by a judge, supernumerary judge or former judge of the Federal Court of Canada. The Immigration and Refugee Board operates autonomously and has its own budget. Decision of the Refugee Division can be overturned in a court of law.

4.15 As to the author's claim under article 7, that his deportation amounts to cruel, inhuman or degrading treatment, because his claim had not been heard by an impartial tribunal, the State party refers to its argument above and argues that the tribunal was impartial and that the author's claim is thus inadmissible.

4.16 As regards the author's claims that he was denied equality before the law because one of the members of the panel was of Ewe ancestry, the State party submits that the allegations of denial of equality rights are without any factual or legal basis and should thus be declared inadmissible.

4.17 The State party finally argues that the Human Rights Committee is not a "fourth instance" competent to re-evaluate findings of fact or to review the application of domestic legislation, unless there is clear evidence that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. In the absence of such evidence, the State party argues that the author's claims are inadmissible.

Issues and proceedings before the Committee

5. The deadline for counsel's comments on the State party's observations was 27 November 1995. By letter of 29 May 1997, counsel was informed that the Committee would examine the admissibility of the communication at its sixtieth session, in July 1997. No submission has been received.

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has argued that the communication is inadmissible for non-exhaustion of domestic remedies. It has also noted the contention of counsel that the post-determination review and the humanitarian and compassionate review are devoid of substance. In this context, the Committee recalls its jurisprudence that mere doubts about the effectiveness of domestic remedies do not absolve an author of the requirement to exhaust them. Further, the Committee notes that it was open to the author to appeal the decision of the Federal Court Trial Division to the Federal Court of Appeal and that he failed to perfect his application for judicial review against the negative post-claim determination decision. The communication is therefore inadmissible for non-exhaustion of domestic remedies.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 5, subparagraph 2 (b), of the Optional Protocol;

(b) This decision shall be communicated to the State party and to the author's counsel.

F. Communication No. 632/1995; Herbert T. Potter v. New Zealand (Decision of 28 July 1997, sixtieth session)[*]

Submitted by:	Herbert Thomas Potter (represented by Mr. Michael Kidd)
Victim:	The author
State party:	New Zealand
Date of communication:	6 April 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Herbert Thomas Potter, a New Zealand citizen at present imprisoned at Mount Eden prison in Auckland, New Zealand, spiritual leader of an organization named "Centre point Community Growth Trust". He claims to be the victim of violations by New Zealand of article 9, paragraph 3, and article 14, of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr. Michael Kidd.

Facts as submitted by the author

2.1 In 1990, the author was convicted and sentenced to three and a half years imprisonment for possession and supply of drugs. Shortly before his release he was charged with rape, a charge then downgraded to indecent assault, perjury and a further drug conspiracy charge. In all he has been sentenced to a total of thirteen years and four months imprisonment.[22]

2.2 The author appealed his second sentence; his appeal was dismissed in April 1993. The author did not appeal to the Judicial Committee of the Privy Council in London, as he was denied legal aid for this purpose on 24 February 1994. For this reason, counsel contends that an appeal to the Privy Council is not a domestic remedy to be exhausted, within the meaning of article 5, paragraph 2, of the Optional Protocol.

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[*] The following members of the Committee participated in the examination of the communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[22] From the State party's submission it appears that the author was convicted and sentenced a second time, on 27 November 1992, to 7 ½ years of imprisonment for indecent assault on minors; a third time, on 28 January 1994, to 2 years' imprisonment for drug-related offences and a fourth time, on 8 February 1994, to 4 months' imprisonment for perjury.

Complaint

3.1 The author claims that his rights under article 9, paragraph 3, of the Covenant have been violated: although the police had sufficient evidence against him in 1990, it was not until he had completed his previous sentence for drug-related charges and was about to be paroled, that he was charged with indecent assault against minors, and was sentenced to seven and a half years of imprisonment. The sentences imposed on him were cumulative. Counsel was informed that the author received a further two-year cumulative sentence for drug conspiracy and another four months cumulative sentence for perjury charges, arising from the first trial in 1990. Counsel alleges that Mr. Potter has been treated as a "special class of prisoner", indicating that his cumulative sentence makes him one of the longest serving prisoners in New Zealand.

3.2 The author claims a violation of article 14, in that he did not have a fair trial. He claims that he was informed by Mr. Peter Williams, counsel for the first trial, that the trial Judge had made an "anti-Centrepoint joke". There is nothing in the file to support this allegation which, therefore, remains unsubstantiated. Further, the author alleges that all the pre-trial publicity made it difficult to obtain an impartial jury; in this respect counsel points out that New Zealand does not have a system of interrogatories for jury members. Counsel further argues that the charges on which the author was convicted arose over twelve years ago and did not involve violence. The author alleges that witnesses against him, who were members of his congregation, had received sums of money as compensation from a Government Agency prior to his trial. It is further alleged that the modification of a rape charge, for which there is a short statute of limitation, to the lesser charge of indecency, in order to overcome the statute of limitations constitutes a violation of article 14 of the Covenant.

3.3 The author claims that he was subjected to ill-treatment while in prison. He has been denied adequate dental treatment for broken teeth caused by the assault he suffered at the hands of a fellow inmate; was refused vitamin supplements, as well as being denied proper reading glasses. His correspondence is interfered with, he receives his mail with delays, is subjected to full body searches on routine visits, and has restrictions for visits from others. Furthermore, counsel alleges that the authorities failed to provide protection when he was assaulted by another inmate in 1993 and that this assault was not investigated.

3.4 Counsel alleges that Mr. Potter is the subject of discrimination by the parole authorities, in that his previous minimum security classification, his good behaviour and non-violence involved in the offences, were not taken into account for his parole. Counsel submits that Judge Cecilie Rushton, of the Parole Board, told Mrs. Potter that early release would not be considered for her husband when his non-parole period comes up for review in August 1998.

State party's information and author's comments thereon

4.1 By submission of 7 December 1995, the State party argues that the communication is inadmissible. As regards the author's claim of a violation of article 9, paragraph 3, because the police failed to bring all charges against him at once, and waited until he was eligible for parole after serving the time of his first sentence before bringing new charges against him, the State party argues that there is nothing to suggest that the author was not brought promptly before a judge and tried within a reasonable time in any of the four sets of charges against him.

4.2 The State party contends that the communication is inadmissible as incompatible with the Covenant, and that the author has failed to substantiate his allegations. In this respect, the State party submits that:

- In 1989 the New Zealand police received information to the effect that the author was involved in the supply of drugs to adults and teenagers members of the Centrepoint Community. Following an investigation he was arrested and charged for supply of lysergic acid diethylamide (LSD) and possession and supply of methylenedioxy-methamphetamine ("Ecstasy"). The offences were alleged to have occurred between October 1988 and September 1989;

- The author was tried on 23 March 1990, found guilty and sentenced to three and a half years' imprisonment for the LSD supply charge and 2 years for the Ecstasy supply charge, to be served concurrently;

- Towards the end of 1989 the police received a series of complaints against Mr. Potter, alleging sexual abuse of children and young persons at the Centrepoint Community. An investigation took place over the next 18 months, during which time more complaints of a similar nature were received. Mr. Potter was arrested and charged on 27 May 1991 with several counts of rape and indecent assault relating to the alleged sexual abuse of five different female complainants. The offences allegedly occurred between 1978 and 1984. All complainants had lived at the Centrepoint Community at the time and all were under the age of 16 when the offences were alleged to have occurred. The author's wife was jointly charged in relation with a number of these offences;

- Mr. Potter was granted bail in relation to the sexual abuse charges on 20 December 1991, in anticipation of his possible early release from prison on parole with regard to the sentence received after the first trial;

- Prior to the second trial, several pre-trial applications were heard between 27 and 29 April 1992, relating to issues that are before the Human Rights Committee: delay between the dates of the alleged offences and the time at which the complaints were made, the question of consent in relation to the rape charges, the issue of what constitutes "assault" for the offence of "indecent assault", and questions relating to the admissibility of evidence;

- The author was tried on 29 October 1992 on 8 counts of rape and 13 counts of indecent assault. Mrs. Potter was jointly charged with her husband on 5 counts of rape and 5 counts of indecent assault. She pleaded guilty to 5 counts of indecent assault. The jury found Mr. Potter guilty on 13 counts of indecent assault. He was sentenced to a total of seven and a half years' imprisonment on 27 November 1992;

- On 2 June 1992, the author, together with two other members of the Centrepoint Community, was charged with conspiracy to supply controlled drugs (Ecstasy). These offences allegedly occurred between 1 May 1988 and 25 May 1992. The author's involvement only became known to the police following a search of his cell, in particular the hard disk of his computer, at the Ohura prison on 24 May 1991. He was tried on 29 September 1993 and sentenced to two years' imprisonment on 28 January 1994;

- On 23 April 1992, the author was charged with 3 counts of perjury during his first drugs trial in 1990, in which he had testified that he had given members of the Centrepoint Community capsules of milk powder and sugar, and not Ecstasy. He pleaded guilty and was sentenced to four months' imprisonment on 8 February 1994.

4.3 As to the allegation of a violation of article 14 of the Covenant, the State party argues that the author's allegations are uncorroborated assertions; a comment made by the trial judge when it was the jury which convicted the author, pre-trial publicity together with the fact that New Zealand law does not provide for an interrogation of jurors, cannot be construed to constitute a denial of the author's right under article 14. The author's right to an appeal was respected, as his conviction was appealed and the New Zealand Court of Appeal, in an ex-parte decision, dismissed the application. The "point of law" raised (how the term assault should be interpreted in "sexual assault") was dealt with by the trial judge in his decision of 28 October 1992, and during pre-trial consideration in April 1992. In this respect, the State party contends that the author has failed to substantiate his claim.

4.4 Concerning the author's assertions that he is unfairly treated, in that he is being treated as a "special class of prisoner", the State party denies that there is any evidence to suggest that the judicial process was applied to the author any differently than to other prisoners charged with similar offences. The allegation that all the events occurred over 12 years ago and did not involve violence is unfounded, as explained in paragraph 4.2 above. The assertion that sexual offences do not involve violence overlooks the violence inherent in any sexual offence. The State party rejects counsel's allegation that the victims received money from a government agency to testify against the author: rather, the victims received compensation for personal injury under the Accident Rehabilitation Act 1992, under which compensation is made available to victims of sexual abuse to assist them with their recovery from the effects of the abuse. Compensation under the Act is entirely separate from the conduct of the criminal proceedings and does not depend on these being brought against the alleged perpetrator, nor on whether the victim gives evidence in such proceedings.

4.5 With respect to the author's allegation of ill-treatment in prison, the State party contends that Mr. Potter relies on alleged violations of the United Nations Standard Minimum Rules for Treatment of Prisoners and that the Committee is only competent to examine alleged violations of the rights set forth in the International Covenant on Civil and Political Rights. The State party further argues that he has failed to exhaust domestic remedies as he could have had access to an administrative complaints procedure under the Penal Institutions Act 1954 and Penal Institutions Regulations 1961 (as amended), as well as to the Ombudsman. He could have pursued legal remedies invoking the New Zealand Bill of Rights Act before the local Courts, if he felt the prison authorities had failed to act diligently in protecting his integrity in prison.

4.6 With respect to the alleged discrimination by the Parole Board, the State party argues that the author has the right to judicial review of the Parole Board decisions in the High Court. It argues that the author wrote to the registrar of the Auckland District Court, regarding a possible review of the

Board's decision, but did not actually lodge formal proceedings. Therefore he failed to exhaust domestic remedies in this respect.

5. In his comments, counsel reiterates his claims that the author has been treated as a "special class of prisoner", that he was not charged promptly, that his trial was unfair, that he was unable to submit an appeal to the Privy Council, that he was ill-treated in prison and that he has been discriminated against by the Parole Board. As to the exhaustion of domestic remedies, counsel contends that the remedies suggested by the State party are not available to the author as he is in prison, and therefore these need not be exhausted.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that the considerations for declaring a communication admissible include, inter alia, that the claims submitted are sufficiently substantiated and do not constitute an abuse of the right of submission. Concerning the author's claim that his trial was unfair because it took place many years after the offence and because he was tried on a charge of indecent assault at a time when a rape charge was time barred, the Committee notes that it appears from the trial transcript that the judge instructed the jury to acquit Mr. Potter on the rape charges for reasons of law. In this connection it also notes that the charges relate to a series of events extending over a long period of time up to a recent date (1978 to 1992). The Committee therefore considers that the author's claim is not substantiated. As to the claim that the trial was unfair because of substantial pre-trial publicity, this matter could have been raised before the trial judge; failure to do so implies that the requirements of article 5, subparagraph 2 (b), of the Optional Protocol have not been met. With regard to the remaining allegations of unfair trial, in particular that witnesses had been influenced by compensation received from a government agency, this issue should similarly have been raised before the appellate courts. The author's failure to do so means that domestic remedies have not been exhausted in this respect either.

6.3 As to allegations of ill-treatment in prison, the Committee does not accept the State party's argument that it is not competent to examine the conditions of detention of an individual, if these are referenced in relation to the United Nations Standard Minimum Rules for the Treatment of Prisoners, since these constitute valuable guidelines for the interpretation of the Covenant. However, it transpires from the file that no complaint in respect of ill-treatment was ever filed by the author, either before the New Zealand judicial authorities or with the Ombudsman. For the purpose of article 5, subparagraph 2 (b), of the Optional Protocol, an applicant must resort to all judicial or administrative avenues that offer him a reasonable prospect of redress. In this respect, therefore, the requirements of article 5, subparagraph 2 (b), of the Optional Protocol have not been met.

6.4 With regard to the author's allegation of discrimination by the Parole Board, the Committee notes the State party's argument that even though the author wrote to the Court Registrar enquiring into the possibility of a review of the Parole Board's decision, no formal review was ever initiated. The same considerations as under paragraph 6.3 above therefore apply.

7. The Committee therefore decides that:

(a) The communication is inadmissible under articles 2 and 5, subparagraph 2 (b), of the Optional protocol;

(b) This decision shall be communicated to the State party and to the author of the communication.

G. Communication No. 643/1994; Peter Drobek v. Slovakia (Decision of 14 July 1997, sixtieth session)[*]

Submitted by:	Peter Drobek [represented by the Kingsford Legal Centre, Australia]
Victim:	The author
State party:	Slovakia
Date of communication:	31 May 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 1997,

Adopts the following:

Decision on admissibility[**]

1. The author of the communication, dated 31 May 1994, is Peter Drobek, an Australian citizen, born in Bratislava. He claims to be the victim of violations by Slovakia of articles 2, 17 and 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Czechoslovakia on 12 June 1991. After the dissolution of the Czech and Slovak Federal Republic, Slovakia notified its succession to the Covenant and to the Optional Protocol effective the first day of the new Republic, 1 January 1993. The author is represented by counsel.

Facts as submitted by the author

2.1 The author would have inherited from his father and his uncle certain properties in Bratislava which were expropriated pursuant to the Benes Decrees Nos. 12 and 108 of 1945 under which all properties owned by ethnic Germans were confiscated. In 1948, the Communist regime expropriated all private property used to generate income. After the fall of the Communist regime, the Czech and Slovak Federal Republic enacted law 87/1991,[23] and after the creation of the State of Slovakia, the Slovakian Government instituted a policy whereby property taken under the Communist regime could be reclaimed. However, the restitution legislation did not cover confiscation effected under the Benes Decrees.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

[**] The text of an individual opinion by Committee members Cecilia Medina Quiroga and Eckart Klein is appended to the present document.

[23] See Committee's Views on Communication No. 516/1992 (Simunek et al. v. Czech Republic), adopted 19 July 1995, and Communication No. 586/1994 (Adam v. Czech Republic), adopted 23 July 1996.

2.2 The author tried to avail himself of the restitution legislation and sought the return of his properties. On 25 May 1993, the local Court of Bratislava dismissed his claims. Counsel claims that the Court does not address the issue of discrimination and the racial injustice the author has suffered. In this respect, he claims that, as there are no effective domestic remedies available to him to obtain redress for the racial discrimination suffered, domestic remedies have been exhausted.

Complaint

3.1 The author claims to be the victim of a violation of articles 2 and 26 of the Covenant by the Slovak Government, because it has endorsed the ethnic discrimination committed before the Covenant existed by enacting a law which grants relief to those who had their lands expropriated for reasons of economic ideology and does not provide it to those expropriated on ethnic grounds. Counsel claims that article 2 of the Covenant in conjunction with the preamble are to be interpreted to mean that the rights contained in the Covenant derive from the inherent dignity of the human person and that the breach committed prior to the entry into force of the Covenant has been repeated by the enactment of discriminatory legislation in 1991 and by the decisions of the Slovak Courts of 1993 and 1995.

3.2 The author claims that there is a violation of article 17 as his family were treated as criminals, their honour and reputation being badly damaged. In this respect, the author claims that until the Slovak Government rehabilitates them and returns their property, the Government will continue to be in breach of the Covenant.

State party's observations and author's comments thereon

4. On 11 August 1995, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure. No submission under rule 91 was received from the State party, despite a reminder addressed to it on 20 August 1996.

5.1 By a letter of 10 August 1995, counsel informed the Committee that domestic remedies had been exhausted in respect of the author's property claim and that the City Court Session, on 9 February 1995, had rejected the author's appeal to the judgement of the Local Court, in Bratislava.[24] There had never been any remedies available in respect of the author's discrimination claim.

5.2 By a further letter of 23 July 1996, counsel claims that Slovak authorities discriminate against individuals of German origin.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee notes with regret the State party's failure to provide information and observations on the question of the admissibility of the communication.

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[24] The author provides the text of the decision in Slovak and an English translation.

6.2 The Committee notes that the challenged law entered into force for the territory of Slovakia in 1991, when that country was still part of the Czech and Slovak Federal Republic, that is, before Slovakia's succession to the Covenant and the Optional Protocol in January 1993. Considering, however, that Slovakia continued to apply the provisions of the 1991 law after January 1993, the communication is not inadmissible ratione temporis.

6.3 Although the author's claim relates to property rights, which are not as such protected by the Covenant, he contends that the 1991 law violates his rights under articles 2 and 26 of the Covenant in that it applies only to individuals whose property was confiscated after 1948 and thus excludes from compensation in respect of property taken from ethnic Germans by a 1945 decree of the pre-Communist regime. The Committee has already had occasion to hold that laws relating to property rights may violate articles 2 and 26 of the Covenant if they are discriminatory in character. The question the Committee must therefore resolve in the instant case is whether the 1991 law applied to the claimant falls into this category.

6.4 In its views on Communication 516/1992 (Simunek v. Czech Republic), the Committee held that the 1991 law violated the Covenant because it excluded from its application individuals whose property was confiscated after 1948 simply because they were not nationals or residents of the country after the fall of the Communist regime in 1989. The instant case differs from the views in the above case, in that the author in the present case does not allege discriminatory treatment in respect of confiscation of property after 1948. Instead, he contends that the 1991 law is discriminatory because it does not also compensate victims of the 1945 seizures decreed by the pre-Communist regime.

6.5 The Committee has consistently held that not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that, in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate the victims of that regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices allegedly committed by earlier regimes. The author has failed to substantiate such a claim with regard to articles 2 and 26.

6.6 The author has claimed that Slovakia violated article 17 of the International Covenant on Civil and Political Rights by not rectifying the alleged criminalization of his family by the Slovak authorities. The Committee considers that the author has failed to substantiate this particular claim.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 2 of the Optional Protocol;

(b) This decision shall be communicated to the State party, to the author and to his counsel.

APPENDIX

Individual opinion by Committee members Cecilia Medina Quiroga and Eckart Klein

[Original: English]

The author of the communication contends that the State party discriminated against him by enacting law 87/1991, which grants relief to individuals whose lands were confiscated by the communist regime and which does not grant it to those of German origin whose lands were confiscated under the Benes Decrees.

The Committee has declared this communication inadmissible for lack of substantiation of the author's claim. We do not agree with this decision. The author has given clear reasons why he thinks he is being discriminated against by the State party: this is not only because of the fact that law 87/1991 applies only to property seized under the Communist regime and not to the 1945 seizures decreed between 1945 and 1948 by the pre-Communist regime; the author argues that the enactment of law 87/1991 reflects the support by Slovakia of discrimination which individuals of German origin suffered immediately after the Second World War. He further adds that such discrimination on the part of the Slovak authorities continues until the present day (paragraphs 3.1 and 5.2). Since article 26 of the Covenant must be respected by all State party authorities, legislative acts also have to meet its requirements; accordingly, a law which is discriminatory for any of the reasons set out in article 26 would violate the Covenant.

The State party has not responded to the author's allegations. A claim of discrimination that raises an issue of substance - not disputed at the admissibility stage by the State party - requires consideration on the merits. We therefore conclude that this communication should have been declared admissible.

H. Communication No. 654/1995: Kwame Williams Adu v. Canada (Decision of 18 July 1997, sixtieth session)*

Submitted by:	Kwame Williams Adu [represented by Mr. Stewart Istvanffy]
Victim:	The author
State party:	Canada
Date of communication:	28 December 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 1997,

Adopts the following:

Decision on admissibility**

1. The author of the communication is Kwame Williams Adu, a Ghanaian national, at the time of submission residing in Canada where he requested recognition as a refugee. He claims to be the victim of violations by Canada of article 2, paragraphs 1 and 3, article 6, paragraph 1, articles 7, 9, 13, 14, paragraph 1, and article 26, of the International Covenant on Civil and Political Rights. He is represented by Mr. Stewart Istvanffy, a Montreal lawyer.

Facts as presented by the author

2.1 The author was born on 16 November 1968. He claims that he was a leading member of the Esaase Youth Association in the Ashanti Region, as well as a soccer player with a popular local club; he was well known and a natural leader in his area. His father is a sub-chief of the local chieftaincy structure. In March 1992, representatives of the military Government of Ghana went to Esaase, to solicit support for the candidacy of Jerry Rawlings to the presidency. The author and the President of the Youth Association manifested their opposition to Mr. Rawlings' candidacy, initiating a door-to-door campaign against the Government. That night, the author was arrested and detained for over five months in bad conditions. A former coach of the Kumani soccer team, availing himself of bribery, was able to secure the author's escape in September 1992.

2.2 The author arrived in Canada on 17 September 1992. He requested refugee status, on the grounds that he had a well-founded fear of persecution based on his political opinion and membership in a particular social group. His claim was heard on 10 May 1993, before two commissioners of the Refugee Division of the Canadian Immigration and Refugee Board, in Montreal, Quebec. The Refugee Division dismissed the author's request for recognition as a political refugee. His application for leave to appeal was denied on 28 June 1994.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Danilo Türk.

** Mr. Maxwell Yalden did not participate in the adoption of the decision, pursuant to rule 85 of the Committee's rules of procedure.

Complaint

3.1 The author claims that he has not received a fair hearing of his refugee claim, in violation of article 14, paragraph 1, of the Covenant. He states that one of the commissioners at the hearing, a Mr. Sordzi, was biased against him; the author therefore claims that the hearing did not meet the requirements for a competent independent and impartial tribunal. In support of his claim that Mr. Sordzi was biased, the author explains that there is a serious ethnic conflict in Ghana, and that the military regime is dominated by the Ewe tribe, to which both Mr. Sordzi and Mr. Rawlings, the President of Ghana, belong, whereas the author belongs to a different ethnic group. Counsel contends that, contrary to the opinion of the Federal Court of Canada, tribal affiliations in Ghana run deep and are not extinguished by physical displacement. The author states that for these reasons Ghanian refugees are afraid to testify before a person of Ewe origin, often contradicting themselves; this is then used to discredit the veracity of their testimony. Mr. Sordzi is said to have opined that all so-called refugees from Ghana were economic migrants. In this respect, counsel claims that Mr. Sordzi is a supporter of the Government in Ghana and that the fact that he sits as judge of his compatriots on refugee claims, violates the right to a fair hearing. Counsel adds affidavits from prominent members of the Ghanaian community in Montreal in order to prove that Mr. Sordzi has a long history of antipathy towards refugee claimants from Ghana.

3.2 The author argues that the language used in the decisions by the Refugee Division clearly shows administrative bias against refugee claimants from Ghana. In this context, reference is made to an alleged preconceived political line with respect of Ghana which does not recognize the factual situation in that country; counsel adds that the panel went to great lengths to find his client's story not credible even though it would appear to be in line with what is known to be the current situation in Ghana.

3.3 Counsel argues that the above-mentioned events and facts also amount to a violation by Canada of article 2, paragraph 1, and article 26 of the Covenant, as he was treated in a discriminatory fashion, because of his ethnic origin and political opinions.

3.4 The author further argues that the death penalty is frequently imposed in Ghana on people convicted for political crimes, and that the State party, by returning him to Ghana would place him in a very dangerous situation, which could lead to a violation of his right to life, in contravention of article 6 of the Covenant. Counsel contends that the deportation of an individual who has not had his claim to refugee status heard by an impartial tribunal, but by a biased one, amounts to cruel, inhuman and degrading treatment within the meaning of article 7, as well as to a violation of article 9, paragraph 1, of the Covenant. It is moreover argued that the author's expulsion would not be in pursuance of a decision reached in accordance with the law, as required by article 13 of the Covenant, because Commissioner Sordzi is said to have exceeded his jurisdiction by making decisions on the credibility of refugee claimants from Ghana.

3.5 Counsel contends that the Federal Court, by dismissing the author's appeal has misapplied Canadian law and thereby eliminated the only effective recourse available to the author, in violation of article 2, paragraph 3, of the Covenant.

3.6 Counsel further submits that Canadian legislation provides for a Post-Determination Review and for a Humanitarian and Compassionate Review, but alleges that these remedies are devoid of substance and illusory. He claims therefore that for purpose of article 5, paragraph 2, of the Covenant domestic remedies have been exhausted.

State party's observations

4.1 By submission of 23 July 1996, the State party argues that the communication is inadmissible and provides information with regard to its refugee determination process.

4.2 The State party recalls that the author reported to immigration authorities in Montreal claiming refugee status on 17 September 1992. He stated that he had arrived in a truck from New York, after having left Ghana for Burkina Faso by car and then by plane to New York with stopovers somewhere in Africa and in Switzerland. On 5 November 1992, the author was found to have a prima facie claim under the Refugee Convention, and a conditional departure notice was issued with obligation to leave Canada within one month of any negative decision of the Immigration and Refugee Board concerning his claim.

4.3 On 10 May 1993, two Commissioners of the Refugee Division of the Immigration and Refugee Board heard the author in order to determine whether he met the definition of Convention refugee under the Immigration Act. The State party explains that a claim succeeds if either member of the panel is satisfied that the claimant meets the definition. At the hearing, the author was represented by counsel (who had been representing him since the initial interview with immigration officers on 13 October 1992), evidence on country conditions was presented, the author gave oral testimony and a number of exhibits were filed. The State party emphasizes that neither the author nor his counsel raised any objection to the constitution of the panel.

4.4 On 15 October 1993, the panel decided that the author was not a Convention refugee. It found the author not credible because of the inconsistencies in his story and because of the implausibility of certain events described by the author. In particular, the panel noted that at the time that the author claimed to have been arrested for opposing the soliciting of votes for the National Democratic Congress' presidential candidate Rawlings, the party did not as yet exist and Rawlings' candidacy was not announced until three months after the events alleged by the author. The author then applied for leave to appeal to the Federal Court Trial Division.[25] The author based his appeal on errors of law and fact, including allegations of reasonable apprehension of bias on the part of panel member Sordzi. On 28 June 1994, his application was denied with no reasons given. No further appeal is available.

4.5 On 17 January 1994, the author, represented by a new counsel, filed a motion for reopening with the Refugee Division in order to have new evidence considered. On 22 March 1994, his request was dismissed since the Division lacked competence to reopen a claim to hear new evidence, and could only reopen a case if the Division had violated a principle of natural justice or committed an error of fact.

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[25] In the immigration context, the Court's stated test for granting leave is that an applicant show "a fairly arguable case" or "a serious question to be determined".

4.6 Under the post-determination refugee claimants in Canada class (PDRCC) review process, individuals determined not to be Convention refugees can apply for residency in Canada if upon return to their country they would face a risk to their life, of extreme sanctions or of inhumane treatment. The author's (new) counsel made representations, including evidence not earlier presented. On 23 January 1995, the author was informed that the post-claim determination officer had concluded that he did not belong to that class of individuals. The author has not sought judicial review of this decision.

4.7 On 12 April 1995, the author failed to show up at a hearing to prepare his voluntary departure from Canada. The State party submits that it is not aware of his present whereabouts.

4.8 The State party argues that the author's communication is inadmissible for failure to exhaust domestic remedies. First, the author failed to seek a humanitarian and compassionate review under section 114 (2) of the Immigration Act.[26] The State party contests the author's claim that this remedy and the post-determination review are devoid of substance. It notes that counsel for the author has based himself on statistics showing a 99 per cent rejection rate, but argues that these figures relate to the situation before the introduction of the PDRCC at a time that such a review was conducted as routine without applications made on behalf of the applicants. The State party maintains that the review is effective in particular cases.

4.9 The author also failed to apply for leave for judicial review of the negative PDRCC decision to the Federal Court Trial Division. The State party explains that on review, the author would have been entitled to raise arguments under the Canadian Charter of Rights and Freedoms similar to the arguments made in his communication to the Committee. Decisions of the Trial Division would have been appealable (with leave) to the Federal Court of Appeal and from there with leave to the Supreme Court.

4.10 Finally, the State party explains that the author could challenge the constitutionality of any provision of the Immigration Act by way of declaratory action or bring an action in the Federal Court Trial Division for breach of his Charter rights.

4.11 The State party concludes that the domestic remedies above were available to the author and that he had a duty to avail himself of these remedies prior to petitioning an international body. Any doubts that the author may have about the effectiveness of the remedies would not absolve him from exhausting them.

4.12 The State party further claims that the communication is inadmissible for failure to substantiate violations of Covenant rights. As regards the author's claims under article 6, the State party argues that the author's exclusion from Canada does not constitute a prima facie violation of his right to life, as his claims were rejected by the competent authorities after a full hearing with possibility of judicial review. In this context, the State party refers to the Committee's Views in Ng v. Canada,[27] where the Committee found that the extradition of the petitioner to a country where he faced the possibility of the death penalty did not constitute a violation of article 6, paragraph 1, since the decision to extradite had not been taken summarily or arbitrarily. The State party adds that the author still has available remedies to exhaust.

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[26] The State party explains that this is a broad discretionary review by an immigration officer to determine whether a person's admission to Canada should be facilitated for humanitarian and compassionate reasons. A wide range of circumstances may be taken into account, including risk of unduly harsh treatment, conditions in the country concerned and any new developments.

[27] Communication No. 469/1991, Views adopted 5 November 1993.

4.13 As regards the author's claims under articles 9 and 13, the State party argues that these articles do not grant a broad right to asylum or right to remain in the territory of a State party. The author was allowed to stay in Canada for the purpose of having his refugee claim determined and was ordered deported only following the rejection of his claim after a full hearing with possibility of judicial review. In this context, the State party refers to the Committee's Views in Maroufidou v. Sweden.[28]

4.14 As regards the author's claim under article 14, paragraph 1, of the Covenant, the State party argues that refugee proceedings are in the nature of public law and as such not encompassed by the phrase "suit at law" in article 14 of the Covenant. In this context, the State party refers to its submissions in respect of Communication No. 236/1987 (VRMB v. Canada).[29]

4.15 Moreover, the State party argues that, even if Immigration and Refugee Board proceedings are held to constitute a "suit at law", sufficient guarantees of independence[30] exist so that it can reasonably be said to be an independent tribunal within the meaning of article 14, paragraph 1. The State party further submits that the two-member panel which decided the author's claim was impartial. In this respect, the State party notes that the author's allegations of bias specifically relate to Mr. Sordzi and not to the presiding member who wrote the decision. In this context, the State party recalls that the author's claim would have succeeded even if the presiding member alone would have come to the conclusion that he was a Convention refugee. The State party submits that the author's allegations of bias are unfounded, as shown by the rejection of his application for judicial review by the Federal Court Trial Division, which apparently did not consider that he had established a "fairly arguable case" of bias. In this context, the State party refers to Federal Court's reasoned decisions dealing with the same allegation of bias against Mr. Sordzi.[31] The

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[28] Communication No. 58/1979, Views adopted on 9 April 1981.

[29] Declared inadmissible on 18 July 1988.

[30] Members are appointed by the Governor in Council for terms of up to seven years and drawn from all segments of Canadian society. They may only be removed on limited grounds by an inquiry procedure presided over by a judge, supernumerary judge or former judge of the Federal Court of Canada. The Immigration and Refugee Board operates autonomously and has its own budget. Decisions of the Refugee Division can be overturned in a court of law.

[31] In particular, the State party quotes from the Federal Court's decision in Badu v. Minister of Employment and Immigration, 15 February 1995, where the judge stated:

> "It is an aberration to suggest that Mr. Sordzi, who arrived in Canada in 1968 and became a Canadian citizen in 1976, cannot, by reason of ancestral warfare and conflict, carry out properly, objectively and judicially the duties and responsibilities which Parliament has imposed upon him."

The Court concluded that the affidavits submitted in evidence were highly subjective and provided no objective corroboration or support.

State party also refers to the transcript of the hearing, which shows no improper interventions by Mr. Sordzi, and to the text of the decision where the reasons for not finding the author credible are well set out. The State party submits that the fact that Mr. Sordzi was of Ghanaian origin and belonged to the Ewe tribe does not in itself create a reasonable apprehension of bias. In this context, the State party explains that the Immigration and Refugee Board relies on members who have a personal knowledge or experience of the countries from which refugee claimants come or who speak the language of the claimants. According to the Canadian courts, this is a desirable feature of the refugee determination process.

4.16 As to the author's claim under article 7, that his deportation amounts to cruel, inhuman or degrading treatment, because his claim had not been heard by an impartial tribunal, the State party refers to its argument above and argues that the tribunal was impartial and that the author's claim is thus inadmissible.

4.17 As regards the author's claims that he was denied equality before the law because one of the members of the panel was of Ewe ancestry, the State party submits that the allegations of denial of equality rights are without any factual or legal basis and should thus be declared inadmissible.

4.18 The State party finally argues that the Human Rights Committee is not a "fourth instance" competent to re-evaluate findings of fact or to review the application of domestic legislation, unless there is clear evidence that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. In the absence of such evidence, the State party argues that the author's claims are inadmissible.

Issues and proceedings before the Committee

5. The deadline for counsel's comments on the State party's observations was 30 August 1996. By letter of 29 May 1997, counsel was informed that the Committee would examine the admissibility of the communication at its sixtieth session, in July 1997. No submission has been received.

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has argued that the communication is inadmissible for non-exhaustion of domestic remedies, while the author's counsel has contended that the post-determination review and the humanitarian and compassionate review are devoid of substance. The Committee recalls its jurisprudence that mere doubts about the effectiveness of domestic remedies do not relieve an author of the duty to exhaust them. In the instant case the author failed to avail himself of the avenue of judicial review against the negative post-claim determination decision. It follows that as far as it relates to the author's claim that his return to Ghana would be in violation of the Covenant, the communication is inadmissible for non-exhaustion of domestic remedies.

6.3 As regards the author's claim that he did not have a fair hearing, once the Federal Trial Court Division rejected the author's application for leave to appeal which was based, inter alia, on allegations of bias, no further domestic remedies were available. The author claims that the hearing was not fair, as one of the two Commissioners who participated was of Ghanaian origin and a member of the Ewe tribe whose hostile attitude towards Ghanaian refugees was said to be well known among members of the Ghanaian community in Montreal. However, neither the author nor his counsel raised objections to the participation of the Commissioner in the hearing until after the author's application for refugee status had been dismissed despite the fact that the grounds for bias were known to the author and/or his counsel at the beginning of the hearing. The Committee is therefore of the opinion that the author has failed to substantiate, for purposes of admissibility, his claim that his right to a fair hearing by an impartial tribunal was violated. In the circumstances, the Committee need not decide whether or not the decision in the author's refugee claim was a determination "of his rights and obligations in a suit at law", within the meaning of article 14, paragraph 1, of the Covenant.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) This decision shall be communicated to the State party and to the author's counsel.

I. Communication No. 658/1995; van Oord v. the Netherlands (Decision of 23 July 1997, sixtieth session)*

Submitted by: Jacob and Jantina Hendrika van Oord

Victims: The authors

State party: The Netherlands

Date of communication: 4 November 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1997,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Jacob van Oord and Jantina Hendrika van Oord née de Boer, United States citizens, living in the United States of America. They claim to be victims of a violation by the Netherlands of articles 2, 3, 5, 6, 7, 12, 14, 15, 16, 17, 23 and 26 of the International Covenant on Civil and Political Rights, as well as of its preamble.

Facts as presented by the authors

2.1 The authors were born in the Netherlands on 16 January 1920 and 13 December 1924, respectively. They married in 1949 and emigrated to the United States of America; in 1954 they became naturalized American citizens and lost their Dutch citizenship. They continued to live in the United States of America.

2.2 In 1972, Mr. van Oord entered into an agreement with the Sociale Verzekeringsbank (SVB) (Social Security Bank), the body implementing Dutch social security insurances. According to the agreement, he joined the Dutch retirement pension scheme (AOW, Algemene Ouderdomswet) by voluntary contributions. He made retroactive premium payments as from 1957, the year the pension scheme was established by the Netherlands, and would consequently be entitled to a Dutch pension as of age 65. The entitlement to a pension was set at 62 per cent of a full benefit for a married man, since, according to the law, the years of absence from the Netherlands between his and his wife's fifteenth birthday and 1 January 1957 had to be deducted percentage wise. Dutch citizens who had their fifteenth birthday before 1 January 1957 and have continuously

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

resided in the Netherlands are entitled to a full benefit under the AOW as of their 65th birthday.

2.3 Mr. van Oord became entitled to his pension benefits on 1 January 1985. On 25 June 1985, he was granted a provisional pension, pending a final assessment of his pension entitlements, and on 7 February 1991, his pension was fixed on 58 per cent of the pension benefits for a married man, plus a supplement for his wife, fixed at 66 per cent of the maximum supplement.

2.4 On 1 April 1985, the AOW was amended to reflect the changing role of women. Whereas before pension benefits for married couples had been based on the premiums paid by the man and on his entitlements, as of 1 April 1985, the right to pension benefits for married women was calculated on the basis of their own entitlements.

2.5 On 12 February 1991, the authors were informed that, because Mrs. van Oord had turned 65 on 13 December 1989, the supplement, which was only intended for wives who had not yet reached the pensionable age, was retroactively withdrawn as of December 1989. Mrs. van Oord was granted a pension benefit, retroactive to 1 December 1989, based on 58 per cent of the full pension benefit of a married woman, on the account that she had not paid premiums over the years 1985 to 1988 (inclusive). The SVB offered Mrs. van Oord the possibility to pay the premiums over the period 1985 to 1988, which she failed to do.

2.6 On 16 April 1991, Mr. van Oord was informed that, following a treaty between the Netherlands and the United States of America, which entered into force on 1 November 1990, his pension was now revised on the basis of the treaty and raised to 86 per cent of the full benefit for a married person. Mrs. van Oord's pension benefit was raised to 76 per cent of the full benefit for a married person.

2.7 Following a revision of the social security scheme in the Netherlands, benefits paid under the AOW, including those paid following a voluntary agreement, became taxable as income as of 1 January 1990. On 31 March 1992, the authors were informed that they had to pay an amount of Fl 1,152.00 on the benefits paid out to them in 1990. They refused to pay and the Tax Office, on 12 October 1993, issued a warrant against them. On 6 July 1994, however, the warrant was withdrawn and the tax assessment was annulled, as it was found that according to the law, the premiums paid by the authors in the eight years prior to 1990 had to be taken into account as negative income, thereby balancing out the income over 1990, so that no taxes were due.

2.8 The authors disagreed with the assessment of their pension benefits, arguing that since they had entered into a contract with the SVB, this could not be unilaterally changed on the basis of amendments in the law. On 27 March 1992, the Raad van Beroep (Board of Appeal) in Amsterdam rejected the authors' appeal, considering that the SVB's determination of the authors' pension had been according to the law. The part of the authors' appeal relating to the taxation of their pension benefits was declared inadmissible by the Board since it is not competent to handle matters of taxation.

2.9 The authors then appealed this decision to the Centrale Raad van Beroep (Central Board of Appeal), which, on 22 April 1994, rejected their appeal. The Central Board considered that the authors voluntarily acceded to the Dutch national pension scheme, and that this pension scheme was subject to legal provisions which could be amended without the authors' prior consent. The Board considered that this condition was implicitly contained in the agreement between

SVB and the authors, and noted in this connection that the authors had benefited from the increase in pension following the treaty between the Netherlands and the United States of America, which was not expressly part of the pension agreement either.

2.10 On 31 August 1994, the European Commission of Human Rights declared the authors' complaint inadmissible, since the matters complained of did not disclose any appearance of a violation of the rights and freedoms set out by the European Convention or its protocols.

2.11 In a further letter, the authors state that they have learned that Australians, New Zealanders and Canadians, who as ex-citizens of the Netherlands purchased voluntary AOW old-age retirement insurance, are awarded non-reduced benefits, whereas benefits for citizens of the United States of America are reduced proportionately for the years spent outside the Netherlands after their 15th birthday and before 1 January 1957. They further state that no taxes are withheld from the others. According to the authors, they were told by Dutch authorities that this was the consequence of different treaty obligations between the Netherlands and Canada, New Zealand and Australia on the one hand, and the United States of America on the other hand.

Complaint

3. The authors claim that the above violates their Covenant rights, since they have been arbitrarily deprived of their property in violation of the preamble of the Covenant which refers to the Universal Declaration of Human Rights. Furthermore, they claim to be victims of a violation of:

- Article 2 of the Covenant, since they have been discriminated against on ground of nationality and no effective remedy is provided;

- Article 3, since married women do not have equal rights;

- Article 5, since human rights have been restricted by the Dutch Government;

- Article 6, since the decrease in pension, contrary to the contract obligation, is said to cut down on the authors' lives;

- Article 7, since the partial confiscation of the pension benefits to which the authors are entitled constitutes cruel and degrading treatment or punishment;

- Article 12, since they have been penalized for emigrating to the United States of America;

- Article 14, since independent and impartial tribunals are outlawed by Article 120 of the Dutch constitution, which precludes the constitutional review of legislation by the judiciary; in this context, it is also alleged that assistance in finding legal counsel was withheld and the use of an interpreter denied, that penalties were imposed without due process and that undue delays were caused by courts by referring them to other courts;

- Article 15, because they were penalized after they had fully paid their part of the agreement, and the punishment was imposed in the absence of any criminal offence;

- Article 16, since Mrs. van Oord was retroactively not recognized as a person before the law until she reached age 65 and then penalized by confiscating from her five years of pension coverage which she had purchased as a partner in marriage;

- Article 17, since the Dutch Tax Department issued a warrant for the payment of 1990 taxes; although this warrant was later withdrawn and the tax assessment annulled, the authors claim that the damage to their reputation had already been done;

- Article 23, since the authors' status as a married couple has been denied;

- Article 26, since the Dutch Government has failed to protect the authors' equal rights and discriminates them on the basis of their nationality.

State party's observations and the authors' reply

4. By submission of 22 November 1995, the State party notes that the authors have not raised the breach of their Covenant rights before the Dutch courts and argues that the communication is thus inadmissible for failure to exhaust domestic remedies.

5.1 In their reply of 7 February 1996, the authors claim that the Dutch reply lacks sincerity, and that they have brought up the elements of violation of human and constitutional rights in their appeals to the Courts, but that the Courts completely ignored this. They further state that, although they invoked the Constitution, they could not invoke the rights of the Covenant since at the time they did not have a copy of the text. They add that they continue trying to find a remedy within the Dutch system, but that all their appeals to the authorities have been ignored.

5.2 In a further letter, dated 22 February 1996, the authors claim that the Court system in the Netherlands is neither independent nor impartial.

6.1 By a further submission, dated 9 October 1996, the State party acknowledges that the authors, although they have not invoked the specific articles of the Covenant, did in fact raise the substance of the rights protected by articles 2, 3, 14, 23 and 26 before the Courts and that domestic remedies in this respect have thus been exhausted.

6.2 The State party maintains, however, that the authors' claims under articles 5, 6, 7, 12, 15, 16 and 17 have not been raised in substance before the Courts and appropriate authorities, nor have the authors initiated proceedings before a civil court, in which they could have invoked these rights. The State party argues therefore that domestic remedies have not been exhausted in this respect.

6.3 The State party further contends that the communication, as far as it relates to claims under articles 5, 6, 7, 12, 14, 15 and 16 is inadmissible for incompatibility with the provisions of the Covenant. As regards the authors' claim under article 5, the State party argues that there is no question of destruction or excessive limitation of the rights guaranteed in the Covenant. As regards articles 6 and 7, the State party submits that changes in the amount of money received by the authors under the pension scheme in no way interferes with their right to life or their right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and that another interpretation would run counter to the clear wording of these provisions.

6.4 As regards the authors' claim under article 12, the State party submits that it has never interfered with the authors' right to leave any country. The legal consequences of the authors' freely made decision to emigrate to the United States cannot be seen as the Government's unlawful interference under article 12. As regards the claim under article 14, the State party submits that the authors have failed to substantiate their claim that they did not receive a fair hearing. The State party explains that article 120 of the Constitution relates to the fact that Acts of Parliament cannot be challenged before the Courts for alleged unconstitutionality and in no way infringes upon the independence of the judiciary.

6.5 As regards the authors' claim under article 15, the State party notes that this relates only to criminal law provisions, whereas the instant case deals with social security issues. As regards article 16, the State party submits that it has not been substantiated in what way it might have violated these provisions.

7.1 In their reply to the State party's submission, the authors argue that if article 15 guarantees even to criminals that deprivation of rights should not take place retroactively, it should certainly apply to law-abiding citizens. As regards the State party's argument concerning article 6 of the Covenant, the authors contest that a violation of the right to life only occurs once someone dies and argue that to "shortchange clients whose money has been taken in exchange for a written promise for certain benefits to sustain them in old age" is an infringement of life.

7.2 The authors submit that they have brought all the points raised in their communication to the attention of the Dutch courts and authorities, even if they may not have quoted the exact article. The authors state that they have been exhausting domestic remedies for seven years and that they are getting nowhere. They claim that seven years exceed any reasonable time-frame. The authors note that they continue trying to obtain a local remedy, not because they believe that they will achieve anything, but because they want to give the Dutch authorities and the judiciary an opportunity to save face with dignity.

Issues and proceedings before the Committee

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee considers that the authors' claims under articles 6, 7, 12, 15, 16, 17 and 23 of the Covenant are based on an interpretation of these provisions which is contradicted by their wording and purpose. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol, as being incompatible with the provisions of the Covenant.

8.3 The Committee considers further that the authors have failed to substantiate their claim, for purposes of admissibility, that the hearings concerning the determination of their pension rights were not fair. In this context, the Committee notes that the authors have not adduced any substantiation for their claim how article 120 of the Constitution would have affected the independence and impartiality of the Courts in dealing with their case. This claim is therefore inadmissible under article 2 of the Optional Protocol.

8.4 The Committee has noted the authors' claim that they have been discriminated against on the basis of their nationality, because (a) their benefits are reduced for the period between their 15th birthday and 1 January 1957 that they were not living in the Netherlands, whereas they are not reduced for Dutch citizens living in the Netherlands, and (b) their benefits are reduced and they are required to pay taxes on them whereas other former citizens of the Netherlands, now citizens of Canada, Australia or New Zealand, do not suffer similar reductions.

8.5 With regard to this claim, the Committee observes that it is undisputed that the criteria used in determining the authors' pension entitlements are equally applied to all former Dutch citizens now living in the United States of America, and that the authors also benefit from a treaty concluded between the Netherlands and the United States of America, which has the effect of raising their pension to a higher level than originally agreed. According to the authors, the fact that former Dutch citizens now living in Australia, Canada and New Zealand benefit from other privileges, entails discrimination. The Committee observes, however, that the categories of persons being compared are distinguishable and that the privileges at issue respond to separately negotiated bilateral treaties which necessarily reflect agreements based on reciprocity. The Committee recalls its jurisprudence that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.[32]

8.6 The Committee finds therefore that the facts as presented by the authors do not raise an issue under article 26 of the Covenant and that the authors have not, therefore, presented a claim under article 2 of the Optional Protocol. This part of the communication is therefore inadmissible.

9. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the State party and to the authors.

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[32] Inter alia, the Committee's Views with regard to Communication No. 182/1984, Zwaan-de Vries v. the Netherlands, adopted by the Committee on 9 April 1987.

J. Communication No. 659/1995; B. L. v. Australia (Decision of 8 November 1996, fifty-eighth session)

Submitted by: Mrs. B. L.

Victim: The author

State party: Australia

Date of communication: 17 December 1994 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 November 1996,

Adopts the following:

Decision on admissibility

1. The author of the communication is B. L., a German citizen, currently residing in Galston, Australia. She claims to be the victim of violations by Australia of articles 1 and 2, paragraphs 1, 2 and 3, articles 7, 14, 16, 17 and 26, of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 On 28 January 1992, the author and her husband filed a complaint against their neighbours (Mr. and Mrs. Kirkness) because of work carried out on an embankment causeway of their adjacent properties; the neighbours' property has a right of way for access over the author's property. When the author removed the constructions, Mr. and Mrs. Kirkness, on 25 May 1992, sued for damages.

2.2 The author claims that the construction was carried out without the correct authorization and initiated proceedings before the Hornsby Council with negative results. She initiated further proceedings before the Equity Division of the Supreme Court, but both the ruling and the appeal went against her. The proceedings have taken place over a period of three years 1992-1994. The author received a notice of motion, declaring her in contempt of the Court's orders, for her refusal to comply with the Court's order to allow the construction on her property.

2.3 The author had privately retained counsel of her own choosing (six different ones), until the appeal hearing, where the author had to defend herself as no lawyer agreed to take on her case.

Complaint

3.1 The author alleges that the Australian legal system and legal profession are corrupt and holds the State party responsible for tolerating it. In this respect, she submits that, since she had to take on her own legal representation, she has developed stress-related health problems. She alleges that the fact that she has had to defend herself before a court in a second language and with no legal background constitutes a violation of the Covenant.

3.2 The author further alleges that the Australian courts are biased against women and immigrants. In this respect the author states that she was not allowed into the courtroom while the judge was instructing the lawyers, allegedly because her and her husband's appearance "aggravated" the magistrate. She also claims that one of the judges shouted at her when she fainted in Court and accused her of feigning. She further alleges, in this respect, that in the judgement given by Judge Windeyer, on 1 February 1994, he said "To say the least the parties in this matter or some of them appear to have a death wish which will involve substantial funds which ought to be put to better purpose than going to legal fees". The author claims that all the above constitute violations of articles 1 and 2, paragraphs 1, 2, and articles 3, 7, 14, 16, 17 and 26, of the Covenant, without, however, further substantiating her claim.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee observes that the allegations of discrimination and bias on the part of the Australian courts have not been substantiated for the purposes of admissibility: they remain sweeping allegations and do not in any way reveal how the author's rights under the Covenant might have been violated. Therefore, the Committee concludes that the author has failed to advance a claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the author and, for information, to the State party.

K. Communication No. 661/1995; Paul Triboulet v. France (Decision of 29 July 1997, sixtieth session)*

Submitted by:	Paul Triboulet [represented by Mr. Alain Lestourneaud, lawyer in France]
Victim:	The author
State party:	France
Date of communication:	27 May 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1997,

Adopts the following:

Decision on admissibility**

1. The author of the communication is Mr. Paul Triboulet, a French citizen born in 1929. He claims to be the victim of a violation by France of article 14, paragraph 1 and subparagraphs 3 (c) and (e), of the International Covenant on Civil and Political Rights. He is represented by counsel (Alain Lestourneaud).

Facts as presented by the author

2.1 On 8 February 1982, the joint-stock company Innotech Europe was set up to promote the industrial application of processes developed by a Canadian university for the bioconversion of vegetable waste into protein food for animals. The company had 10 shareholders, including the author and Mr. G. Morichon, a legal adviser. On the same day the author was appointed chairman and managing director of the company with the agreement of the principal directors.

2.2 In the course of 1983, relations between the partners of the company deteriorated, and on 15 April 1983 the auditor resigned following a disagreement over the magnitude of the author's travel expenses. On 8 March 1984, Mr. M. Botton, as resigning director, was replaced by another shareholder. At a general meeting on 28 June 1984, Mrs. Slobodzian, a director, was removed from office and replaced by Mr. Morichon. On 3 September 1984, the author was in turn relieved of his duties as chairman and managing director.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

** Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the case.

2.3 On 13 October 1986 the commercial court (tribunal de commerce) of Besançon ordered the affairs of the company, which by then had liabilities of around FF 1,300,000, to be administered under court supervision (redressement judiciaire). On 18 March 1991 the company went into liquidation by court order.

2.4 With regard to the legal action taken by the author, his first complaint was lodged on 28 September 1984 for false representation against Mr. Morichon, who was said by the author to have made him believe in the company's solvency. On 8 February 1985, after a report by the reporting judge of the commercial court of Besançon on the situation of Innotech, the public prosecutor attached to the tribunal of Besançon (tribunal de grande instance), requested the divisional commissioner of the Dijon crime squad (service des renseignements de la police judiciaire), to start an investigation. On 18 June, the chief prosecutor of Besançon, noting that there were serious allegations of misuse of company assets (abus de biens sociaux), against the author, requested the initiation of criminal proceedings, and an examining magistrate was appointed the following day. On 9 September 1986, the author filed a further complaint for threats, false representation and misuse of signature in blank, contending that the shareholders had concealed from him the exact amount of the company's debt.

2.5 On 13 January 1987, the author was charged with misuse of company assets and credits, and also with having claimed unwarranted travel expenses. On 7 September 1987, owing to problems of internal organization of the court, the public prosecutor requested the appointment of another examining magistrate; on the same day, a new examining magistrate was appointed. On 10 February 1988, the author informed the examining magistrate that he was unable to attend a hearing convened for 11 February. On 11 and 15 February, the magistrate heard two of the former shareholders appearing as witnesses.

2.6 On 26 May and on 9 and 17 June 1988, the author filed three new complaints. On 19 June, the examining magistrate issued an order of referral and on the following day ordered the joinder of the investigation into misuse of company assets and some of the complaints whereby the author had brought criminal indemnification proceedings. On 12 June 1990, the magistrate proceeded with another examination of the author. On 26 December 1990, the author sent a letter to the Minister of Justice claiming that the court-appointed administrator had not proposed any recovery plan since the judgement placing the administrator of Innotech's affairs under court supervision, and that there had been substantial delays in examining his complaints. On 12 February 1991, the public prosecutor informed the examining magistrate of the author's claims. However, on 15 March 1991, the author, although summoned by the examining magistrate, did not enter an appearance because of an impediment at work.

2.7 On 26 April 1991, the examining magistrate proceeded with another examination of the author, and on 4 January 1992 issued a new order of referral. Two days later, the presiding officer of the tribunal of Besançon appointed yet another examining magistrate owing to internal problems of organization of the court. On 27 May 1992, the public prosecutor submitted his final application against the author and, by order of 30 June 1992, committed the author to the criminal court (tribunal correctionnel) for trial. The complaints lodged by the author in 1984, 1986 and 1988 were, however, dismissed by the examining magistrate on the ground that the examination had not disclosed sufficient evidence of any false representation, threats, attempted extortion by force or duress of a promise, waiver or signature, fraud or misuse of signature in blank by anyone against the author.

2.8 On 8 and 9 July 1992, the author appealed both against the orders of dismissal of his complaints and against the order of committal to the criminal court. By decisions dated 9 December 1992, the indictment division (chambre d'accusation) of the Court of Appeal of Besançon rejected the author's appeals and confirmed the orders issued. On 18 December 1992, the author lodged an appeal with the Court of Cassation and, by decisions of 4 May 1993, the Court of Cassation, having ascertained that the author had abandoned his appeal, recorded that fact. As to the author's last appeal against the latter decision of the indictment division of 9 December 1992, which had concerned one of the orders of dismissal relating to the complaints lodged by the author, the Court of Cassation decided on 1 February 1994 to reject the author's appeal on the ground that the indictment division had replied to the main submissions of the claimant and had set out the grounds on which it had found that there was not enough evidence that anyone had committed the alleged offences.

2.9 At the hearing before the criminal court on 8 September 1993, the author requested a confrontation between him and several witnesses and an accounting expert evaluation. By judgement of 22 September 1993, the criminal court sentenced the author to two months' imprisonment (suspended) and fined him FF 20,000, concluding that the facts made it possible to determine with certainty that the author had squandered the company's capital in his own personal interest and that he was guilty as charged. On 4 October 1993, the author and the public prosecutor appealed against his conviction, but his grounds of appeal only reached the court on 7 December 1993, the day of the hearing. By judgement of 21 December 1993, the Court of Appeal of Besançon sentenced him to 10 months' imprisonment (suspended) and fined him FF 25,000, on the ground that the author had used the company's accounts, including his current account as a partner, as a bank to pay off his loans and those of persons close to him, without any concern for the company's credit and finances.

2.10 On 22 December 1993, the author appealed against this judgement to the Court of Cassation. On 29 March, a reporting judge was appointed by the Court of Cassation. On 1 and 5 August 1994, the author and the reporting judge respectively submitted supplementary pleadings and a report. On 19 August 1994, the advocate-general was appointed and, by decision of 28 November 1994, the Court of Cassation rejected the author's appeal.

Complaint

3.1 According to the author, the criminal court failed to even mention in its judgement his request to obtain an expert evaluation of the company's accounts and a confrontation between several witnesses. This, he argues, constitutes a violation of article 14, paragraph 1 and subparagraph 3 (e), of the Covenant.

3.2 The author affirms that he did not have a fair trial because the Court of Appeal of Besançon increased the sentence pronounced at first instance by the criminal court, basing itself on facts that did not form part of the original charges and on which he was not able properly to defend himself. The author claims that this constitutes a violation of article 14, paragraph 1.

3.3 Mr. Triboulet contends that he is a victim of a violation of article 14, paragraph 1, because the Court of Appeal of Besançon, which had to rule on the substance of the case, was not an independent and impartial tribunal. He points out that one of the judges of the Court of Appeal had also sat as a judge in the indictment division of that same Court when it ruled, on 9 December 1992, on the appeals against the dismissal orders issued by the examining magistrate. According to the author, the principle of the separation of the functions of examination and judgement should have prohibited that judge from deciding on the substance of the case. Counsel refers in this regard to the decision of the European Court of Human Rights in the Piersack case. However, this matter was not brought to the attention either of the Court of Appeal or of the Court of Cassation.

3.4 Lastly, Mr. Triboulet alleged a violation of article 14, subparagraph 3 (c), on account of the justifiable length of judicial proceedings in his case. He points out that the proceedings lasted for nine years and nine months from the outset of the investigation, ordered on 8 February 1985, to the date of the decision of the Court of Cassation. From the date of the indictment, on 13 January 1987, to the Court of Cassation's decision, the proceedings lasted seven years and 10 months. In both cases, the author considers that the duration of the proceedings exceeded the requirements laid down in the Covenant.

State party's observations on admissibility and the author's comments thereon

4.1 In its observations under rule 91 of the rules of procedure, dated 4 April 1996, the State party requests the Committee to declare the communication inadmissible, principally on account of non-exhaustion of domestic remedies and subsidiarily because Mr. Triboulet does not qualify as "victim" within the meaning of article 1 of the Optional Protocol. In the first context, the State party points out that the author failed to avail himself of the means provided by domestic law that could have made it possible, had his allegations been substantiated, to remedy the violations of the Covenant which he claims before the Committee. Thus, in his application to the Court of Cassation, for judicial review of the decision of the criminal appeals division (chambre des appels correctionnels) of the Court of Appeal of Besançon on 21 December 1993, the author did not bring to the attention of the Court of Cassation the arguments relating to the length of the proceedings, the impartiality of the judge who had also taken part in the deliberations of the indictment division of the Court of Appeal, or the lack of response from the criminal court to his request for an expert evaluation and a confrontation with witnesses. Concerning the latter claim, the State party observes that the author omitted to restate his request for a confrontation with witnesses and an expert evaluation before the Court of Appeal of Besançon. The Government notes, with regard to the complaint questioning the impartiality of the Court of Appeal judge, that the author failed to avail himself of an effective remedy - a motion challenging the judge - which would have enabled the President of the Court of Appeal to consider the merits of the complaint.

4.2 The State party recalls that, when filing his supplementary pleadings before the Court of Cassation on 1 June 1994 calling for the Court of Appeal's decision of 22 September 1993 to be set aside, the author neglected to refer to any of the above-mentioned claims. Accordingly, the Court of Cassation notes that the argument put forward by the author, "who confines himself to questioning the sovereign appreciation by the judges on the merits of the facts and circumstances of the case in adversary proceedings, cannot be accepted". The State party invokes the Committee's jurisprudence to the effect that domestic remedies cannot be said to have been exhausted when complainants have not submitted to the national authorities, even in substance, the complaints which they then bring before the Committee.[33]

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[33] See, for example, the decision on Communication No. 243/1987 (S. R. v. France), 5 November 1987, para. 3.2.

4.3 As to the question of the impartiality of the judge of the Court of Appeal of Besançon who had sat in the indictment division of the same Court, the State party notes that the author could have introduced a motion challenging the judge pursuant to articles 668 and 669 of the Code of Criminal Procedure. Since the author did not avail himself of that remedy, he is hardly in a position to question the impartiality of the judge before the Committee. As to the absence of a response from the criminal court to the request for an accounting expert's evaluation and a confrontation with the witnesses, the State party notes that in the submissions which reached the Court of Appeal on the day of the hearing on 7 December 1993, the author had not called either for such an evaluation or for a confrontation with the witnesses. According to the State party, it was for the author to submit any such request to the Appeal Court and in particular to assess, in substance, all the violations of the Covenant, in accordance with article 509 of the Code of Criminal Procedure (Code de Procédure Pénale), which stipulates that "the matter shall be brought before the Court of Appeal within the limit set by the notice of appeal and by the standing of the appellant ...".

4.4 Subsidiarily, the State party considers that the author does not qualify as a victim in respect of the alleged violations of article 14. As regards the alleged violation of paragraph 1, concerning the partiality of one of the judges and the principle of separation of the functions of examination and judgement, the State party, while subscribing to the principle of the separation of functions, submits that, it is necessary to scrutinize the facts in the author's case in order to determine the extent to which the same judge had cognizance of the same elements of the case at different stages in the proceedings. The State party points out that the author withdrew his appeal before the indictment division concerning the order of committal to the criminal court issued by the examining magistrate. Thus, it has to be determined whether the applicant's fears can be held to be objectively justified,[34] when a judge sitting in the criminal appeals division has previously, in the indictment division, merely confirmed the dismissal orders of the examining magistrate. In the indictment division, the judge in question was called upon only to decide on the validity of the dismissal orders concerning the proceedings brought by the author against his former partners: at no time was this judge required, in the indictment division, to pronounce upon the charges laid against the author. The State party submits that a distinction has to be made between the nature of the facts set before the judge in the indictment division, which concerned only the proceedings brought by the author himself, and the charges in respect of which he was sent for trial before the criminal court: the facts were different since in one case Mr. Triboulet was the plaintiff and in the other he was the accused.

4.5 The State party therefore concludes that there is compatibility, in the present case, between the exercise of the functions of a judge within the criminal appeals division - hence, the author has no standing before the Committee as a victim in that regard. The State party also notes that the case law of the European Court of Human Rights referred to by the author does not have strict application and has undergone a number of changes (particularly in the Saraiva de Carvalho judgement).[35]

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[34] Reference is made to the case law of the European Court of Human Rights - Saraiva de Carvalho judgement of 22 April 1994, series A No. 286-B, para. 35, p. 10.

[35] Reference is made to the decisions in the cases Hauschildt v. Denmark, judgement of 24 May 1989, and Nortier v. the Netherlands, judgement of 24 August 1993.

4.6 Concerning the question of the lack of a fair hearing, insofar as the Court of Appeal is said to have increased the sentence previously imposed by the criminal court basing itself on facts that did not form part of the original charges, the State party notes that the Court of Appeal, in characterizing one course of conduct of the author, specifically that he did not comply with certain provisions of the Companies Act (loi sur les sociétés) of 24 July 1966, merely evaluated one of the elements of the file submitted for free discussion of the parties, without adding it to the initial charges. Clearly, the Court of Appeal could not base itself on acts not punishable in criminal law to increase the sentence pronounced at first instance against the author: only the more severe appreciation of the actions of Mr. Triboulet which were punishable in criminal law motivated the heavier sentence handed down by the Court of Appeal. For this reason, too, according to the State party, the author does not qualify as a victim.

4.7 With regard to the alleged violation of article 14, subparagraph 3 (c), of the Covenant, the State party notes that, in view of the complexity of the case and the conduct of the author himself, a duration of seven years and 10 months for the proceedings is justified. Firstly, the author himself filed several complaints against his former partners and this, according to the State party, complicated the proceedings. Secondly, since the author made a large number of related accusations against his former partners, a long and thorough investigation of all the complainant's accusations was required. In this regard, the examining magistrate, noting a connection between the proceedings brought against the author and those initiated by the author himself, decided on 20 June 1988 to join the proceedings: the multitude of claims and counterclaims made the case more complex and added to the task entrusted to the examining magistrate.

4.8 The State party submits that the author's course of conduct contributed significantly to delaying the proceedings. On two occasions, the author failed to attend hearings convened by the examining magistrate (February 1988 and March 1991). In the same sense, the former associates against whom the author took action manifested no particular interest in helping the proceedings to move forward. As regards the duration of the proceedings, the State party observes that the author initiated numerous actions and appeals before the higher courts in a manner that was not pertinent, and that he should be regarded as solely responsible for the length of the proceedings. By contrast, the domestic courts showed great diligence: for example, the Court of Appeal, seized on 4 October 1993 by the author, rendered its judgement on 21 December 1993; the proceedings before the Court of Cassation were likewise conducted with all the necessary diligence.

5.1 In his comments, counsel reaffirms that there were excessive delays in the examination of the case, in violation of article 14, subparagraph 3 (c). He recalls that the author had addressed a letter to the Minister of Justice, dated 26 December 1990, complaining of the length of the proceedings, and adds that claiming a violation of the notion of reasonable time before the Court of Cassation, the court of last resort in criminal proceedings, would have served no purpose insofar as the duration of the previous proceedings is concerned. For counsel, to require that the length of criminal proceedings should be invoked before the highest appellate instance is tantamount to denying the content of the right protected.

5.2 Counsel argues that the problems of internal organization of the Tribunal of Besançon, referred to by the State party, do not justify the excessive delays in the examination of his client's case. As to the action of the author himself, counsel submits that Mr. Triboulet cannot be blamed for having used all the domestic remedies available to him to protect his rights and organize his defence. That the author appealed the committal order to the criminal court but abandoned his appeal in the end does not in itself constitute a valid argument for justifying the excessive length of the proceedings.

5.3 According to counsel, the inadmissibility argument of the State party in relation to the heavier sentence pronounced by the Court of Appeal cannot be allowed, since the author had expressly included in his pleadings before the Court of Cassation the argument that the criminal judge is barred from ruling on facts other than those set out in the formal charges. This is said to be a violation of the concept of a fair hearing guaranteed by article 14, paragraph 1, of the Covenant.

5.4 Counsel argues that there is no requirement for the author to refer expressly to the relevant provision of the Covenant - it is sufficient for there to be a "substantive" link between the alleged violation and one of the rights guaranteed by the instrument concerned. In his view, the fact that neither the author nor his lawyer had themselves based their claim on the Covenant "does not make it possible to conclude that the domestic court has not availed itself of the opportunity that the rule of the exhaustion of domestic remedies has precisely the aim of affording to States ...".

5.5 As to the claim that the author does not qualify as a victim within the meaning of article 1 of the Optional Protocol, counsel points out that the distinction made by the Government regarding the functions exercised by the same judge in the indictment division and then in the criminal appeals division of the Court of Appeal of Besançon cannot be allowed inasmuch as this argument has no relevance to the victim's standing. Firstly, the State party stresses that the examining magistrate, in June 1988, ordered the joinder of the investigation into misuse of company funds with some of the complaints initiated by the author against his ex-associates. His case therefore formed an indivisible whole in law. These facts are further stated in the public prosecutor's final application on 17 May 1992, which led to the conviction of Mr. Triboulet.

5.6 For counsel, the facts alleged were indeed connected inasmuch as there was a close link between the allegations contained in the complaints lodged by the author and the charges brought against him in the same context. Reference is made to article 39 of the Code of Criminal Procedure, which prohibits the examining magistrate, on pain of nullity, from "participating" in the judgement of criminal cases of which he had cognizance as an examining magistrate. Therefore, the judge who served in the indictment division of the Court of Appeal of Besançon was not entitled to sit in the criminal appeals division of the same court as well, when it decided on the substance of the case.

5.7 Furthermore, counsel notes that the State party has not shown that the author was not personally affected by the conviction. It is clear that the Court of Appeal unilaterally increased the sentence pronounced at first instance on the basis of elements of fact not mentioned in the charges, and without having held any adversary hearing. The reasoning of the Court of Appeal enabled it to characterize what it even describes as the author's "bad faith" and the Court of Cassation for its part did not review that point at all. The author can therefore properly claim to be the victim of a violation of article 14, paragraph 1. Counsel adds that there must be no confusion between lack of standing as a victim, which is to be determined when considering the admissibility of the complaint, and the substantive arguments which relate to the alleged violation itself and which are to be taken into account in the adoption of any views.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The author alleges a violation of article 14, paragraph 1 and subparagraph 3 (e), on the ground that the criminal court of Besançon did not accede to his request to obtain an expert evaluation of the accounts of his company and the confrontation between several witnesses in the case, and because a judge sitting in the criminal appeals division of the Court of Appeal of Besançon had also sat in the indictment division of that same court, as the instance which reviewed the dismissal orders issued by the examining magistrate. The State party concludes in this regard that the claim is inadmissible because all available remedies have not been exhausted. The Committee notes that the author did not bring these complaints either before the Court of Appeal or before the Court of Cassation. He did not, for example, introduce a motion to challenge the judge who had sat in the indictment division and the Court of Appeal, pursuant to articles 668 and 669 of the Code of Criminal Procedure, a remedy which would have enabled the President of the Court of Appeal of Besançon to evaluate the merits of that claim. The Committee recalls that while complainants are not required to invoke specifically the provisions of the Covenant which they believe have been violated, they must set out in substance before the national courts the claim which they later bring before the Committee. Since the author did not raise these complaints either before the Court of Appeal or before the Court of Cassation, this part of the communication is inadmissible under article 5, subparagraph 2 (b), of the Optional Protocol.

6.3 The author contends that the Court of Appeal increased the sentence pronounced at first instance by the criminal court basing itself on facts that did not form part of the original charges and on which he was not able properly to defend himself. The Committee notes that the author did in fact raise this complaint in his supplementary pleadings before the Court of Cassation; he cannot therefore be criticized for not having exhausted available domestic remedies in this respect. It appears from the file, however, that the Court of Appeal of Besançon based itself on exactly the same charges as the court of first instance but simply judged more severely than the first instance some of the acts of which the author was charged, including non-compliance with certain provisions of the Companies Act of 24 July 1966. The Committee recalls that it is in general for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in any given case, unless it can be ascertained that the evaluation of evidence was arbitrary or otherwise amounted to a denial of justice. Since no such irregularities have been shown to have occurred in the instant case, this part of the communication is inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

6.4 The author claims that the length of the examination of his case and of the judicial proceedings was excessive and therefore in violation of article 14, subparagraph 3 (c), of the Covenant. The State party has argued that the author has failed to exhaust domestic remedies in this regard, since he has not brought this claim before the Court of Cassation. The author's counsel has argued that this remedy would have served no purpose. The Committee recalls its jurisprudence that mere doubts about the effectiveness of an available remedy do not absolve the author of a communication from exhausting it. In the circumstances, the Committee concludes that this part of the communication is inadmissible for non-exhaustion of domestic remedies, under article 5, subparagraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under articles 3 and 5, subparagraph 2 (b), of the Optional Protocol;

(b) This decision shall be communicated to the State party, to the author and to his counsel.

L. Communication No. 674/1995; Lúdvík E. Kaaber v. Iceland (Decision of 5 November 1996, fifty-eighth session)

Submitted by: Lúdvík Emil Kaaber

Victim: The author

State party: Iceland

Date of communication: 12 October 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 November 1996,

Adopts the following:

Decision on admissibility

1. The author of the communication is Lúdvík Emil Kaaber, an Icelandic citizen residing in Reykjavik, Iceland. He claims to be a victim of violations by Iceland of articles 2 and 26 of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 The author is self-employed, working both as a translator and a lawyer in Reykjavik.

2.2 As a self-employed person, the author is obliged, under Icelandic tax laws, to declare as income an amount comparable to what he would have earned if he performed similar work as an employee. According to Act No. 55/1980, section 4, every self-employed person must contribute "at least 10 per cent" of his computed wages to a pension fund. As these 10 per cent are included in the author's taxable income, tax is levied on the total 10 per cent contribution.

2.3 As regards employed wage-earners, regulations on pension fund contributions are established through collective labour agreements, both in the public and the private sector. According to these provisions, 4 per cent of the employee's wages are withheld and paid into a pension fund. Another 6 per cent of the employee's wages are contributed by the employer and paid directly by the employer into a pension fund. Tax is therefore levied on 40 per cent of an employee's pension fund contribution, as these 40 per cent are included in the employee's taxable income, whereas tax is levied on 100 per cent of a self-employed person's pension fund contribution. For the employer who pays them, these pension fund contributions are deductible as "operating expenses".

2.4 In the author's tax return for 1992, he deducted his pension fund contribution from his taxable income. In July of 1992, he received a letter from the local tax authority (skattstjóri), notifying him that his taxable income had been increased by the amount corresponding to his pension fund contribution. The author replied to the local tax authority and protested against this practice, asking for a detailed explanation. In October 1992 he received a letter from the fiscal office, stating that the contributions in question were not deemed to constitute "operating expenses" within the meaning of section 31 of the Income Tax Act. This section contains a general description and non-exhaustive enumeration of deductible business expenses. In this letter, reference was made to a decision of the State Internal Revenue board (Ríkisskattanefnd), where a taxpayer's request to deduct certain expenses had been refused, because it was "established that the applicant paid the said charges exclusively for his own sake".

2.5 The author then applied to the State Internal Revenue Board, S.I.R.B. (Yfirskattanefnd) (the successor to Ríkisskattanefnd), on 6 November 1992. After several rounds of correspondence (in which the author, inter alia, raised questions about the procedure before the Board, as well as doubts regarding the members' impartiality), the S.I.R.B. delivered its decision on 5 November 1993. The Board stated, inter alia: "It is established that the pension fund contributions concerned solely provisions made for the applicant's own pension. The payments in question can therefore not be deemed to have been made for the generation of income in the applicant's independent business operation, and therefore neither to be deductible under section 31.1 of Act No. 75/1981, in respect of Tax on Income and Property, ...". After notification of the Board's decision, the author complained to the Ombudsman about certain issues concerning the procedure before the Board, such as its duty, under Icelandic law (Act No. 32/1992), to provide detailed reasoning for its decisions. The Ombudsman replied in writing on 11 February 1994, enclosing replies given in writing by the Chairman of the S.I.R.B. to the Ombudsman.

2.6 On 11 February 1994 the author sent a letter to the Public Prosecutor, expressing doubts about the procedure before the S.I.R.B., in particular about the impartiality of the members of the Board. He received a reply two weeks later, indicating that no measures could be taken.

2.7 The author claims that the taxation practice he is challenging has been applied during about 13 years in Iceland, and that the Icelandic fisc earns approximately 300 million Icelandic kronur per year with this practice. According to the author, the fiscal authorities have accepted a deduction of these pension fund contributions in some cases, as was the case for the author himself in 1990 and 1991.

2.8 As regards the question of exhaustion of domestic remedies, the author submits that it would be possible for him to challenge the decision of the S.I.R.B. before the domestic courts in Iceland. In this context, he refers, however, to a specific complaint by a self-employed person regarding his right to deduct 60 per cent of his pension fund contribution from his taxable income, which was lodged with a court of first instance in Iceland in 1994. A judgement in this case was expected for October 1995. The author states that he does not expect this decision to be in favour of the plaintiff, and that if he were to bring legal action himself, the decision in his case would undoubtedly be similar to the decision in the case pending. He claims that domestic remedies in his case would therefore not be useful.

Complaint

3.1 The author claims that self-employed persons and employed wage-earners in Iceland are subjected to different treatment inasmuch as taxes levied by the Icelandic Government on pension fund contributions, under applicable tax law, are concerned. He claims that this different treatment constitutes unlawful discrimination.

3.2 The author claims that the Icelandic Government violates national laws, as well as basic constitutional principles and principles of international law, when allowing its fiscal offices to apply the above practice.

State party's submission and the author's comments thereon

4.1 By submission of 21 February 1996, the State party argues that the communication is inadmissible for non-exhaustion of domestic remedies. The State party explains that the author could have appealed the decision by the State Internal Revenue Board of 5 November 1993 to the District Court and, if necessary, from there to the Supreme Court.

4.2 The State party notes that recently the Reykjavik District Court ruled on a case which is identical to that of the author. This case has been appealed to the Supreme Court, which has not yet decided on the matter.

5.1 In his comments on the State party's submission, the author takes the opportunity to add to his claim that he has also been a victim of a violation of article 14, paragraph 1, of the Covenant, because the State Internal Revenue Board cannot be considered an independent tribunal.

5.2 As regards his claim under article 26 of the Covenant, the author points out that no law in Iceland prevents self-employed persons from enjoying the same tax deduction as employees. However, the tax authorities are interpreting the regulations differently.

5.3 The author admits that he could have brought an action and requested invalidation of the decision by the State Internal Revenue Board to the court, on the basis that the S.I.R.B. had not given full reasons for its decision. However, he argues that, if successful, this would only have led to referral of the matter back to the S.I.R.B., whereas the author has little confidence that the S.I.R.B. would follow lawful procedure after such referral. Further, the author claims that such a referral would have rendered the proceedings too lengthy. Moreover, the author contends that he cannot bring questions such as the misuse of public authority by the S.I.R.B. before the courts. The author also argues that to require that he await the outcome of the Government's appeal against the Reykjavik District Court's decision in a case similar to his, would merely reduce the likelihood that complaints such as his are submitted to the Committee. The author further states that he is not convinced that the case now before the Supreme Court is exactly identical to his.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has argued that the communication is inadmissible for failure to exhaust domestic remedies. The Committee notes that the author has not contested that he could have appealed the decision of the State Internal Revenue Board to the courts, but has merely stated that he doubted that an appeal would be effective. The Committee recalls its jurisprudence that mere doubts about the effectiveness of domestic remedies, do not absolve an author of the requirement to exhaust them. The communication, therefore, is inadmissible under article 5, subparagraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 5, subparagraph 2 (b), of the Optional Protocol;

(b) This decision shall be communicated to the State party and to the author.

M. Communication No. 679/1996; Darwish v. Austria (Decision of 28 July 1997, sixtieth session)*

Submitted by: Mohamed Refaat Abdoh Darwish

Victim: The author's brother,
Salah Abdoh Darwish Mohamed

State party: Austria

Date of communication: 31 March 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mohamed Refaat Abdoh Darwish, the brother of Salah Abdoh Darwish Mohamed, an Egyptian citizen currently imprisoned in Austria. The author states that his brother is not able to file a complaint himself because of the conditions of his imprisonment. He claims that his brother is a victim of violations by Austria of articles 7, 14, paragraphs 1, 2 and 3, of the International Covenant on Civil and Political Rights.

Facts as presented by the author

2.1 The brother of the author was arrested at the end of January 1992 and charged with the murder of his divorced wife, Elfriede Patschg, on 29 January 1992. In the course of the investigations, his brother was also charged with wilfully casting false suspicion on the former husband of the victim, Kurt Maier. On 12 November 1992 the brother of the author was found guilty as charged and sentenced to life imprisonment by the Criminal Court of Graz. On 6 May 1993 the Austrian Supreme Court dismissed the appeal. With this, it is submitted, all domestic remedies have been exhausted.

2.2 The case for the prosecution was that, on 29 January 1992, Elfriede Patschg died as a result of several blows on the head, strangling, and twenty-one stabs with a kitchen knife.

2.3 According to the author, the prosecution mainly relied on the expert testimony of one Dr. Zigeuner and the evidence of one Milan Reba as well as on the fact that, on 14 June 1988, the victim had appointed the defendant as her sole heir. In his testimony, Dr. Zigeuner attested that the defendant was motivated by hatred, rage, jealousy, sadism and vindictiveness as well as selfishness. Milan Reba testified that he noticed at nightfall a person on the balcony of the flat of the deceased at the time of the incident and at trial identified this person as the defendant.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

2.4 The defence of the author's brother was based on alibi and on the fact that Milan Reba in the course of previous interrogations had testified that he did not recognize the person on the balcony.

2.5 On 4 February 1993 the defendant's lawyer filed the grounds of appeal which mainly concerned the severity of the penalty and the evaluation of the evidence. With respect to the evaluation of the evidence, he pointed out that the evidence Milan Reba had given in Court was inconsistent with the previous evidence he had given in the course of the investigations. He also stated that there were no traces of blood to be found on the clothes of the defendant, and that a good relationship had always existed between the deceased and the defendant and therefore the defendant had no motive for the murder. He claimed that the Court had not respected the principle "in dubio pro reo" and had shifted the burden of proof upon the defendant. The Austrian Supreme Court dismissed the appeal on 6 May 1993.

Complaint

3.1 It is submitted by the author that his brother is a victim of a violation of article 7 of the Covenant in view of the conditions of his detention. The author claims that after his arrest his brother received no medical treatment for a broken hand and that therefore his hand is now disfigured. The author further states that, after the judgement of the Court, his brother was held in solitary confinement for eight days in a cell without any daylight and that he was treated with medication which affected his mental capacities. The author claims that under the conditions of his detention, his brother attempted a suicide by cutting his arteries.

3.2 The author further points out, that, because of the solitary confinement, his brother was not able to file an appeal in time.

3.3 With reference to article 14, subparagraph 3 (a), the author points out that his brother was arrested when he was in hospital to receive medical treatment for his broken hand, that the reasons for his arrest were not revealed to him, and that he had no possibility to inform his family or the Egyptian embassy of his arrest. The author claims that there was no reason to detain his brother because there was no evidence against him, e.g. no traces of blood were found on his clothes and there was no indication that his brother had been at the scene of the crime.

3.4 As to article 14, paragraphs 1 and 2, the author submits that his brother was not regarded as innocent during the trial but that the burden of proof lay with him. He claims that the Court was not able to prove the guilt of his brother because there was no evidence. The author further claims that the Court did not take into consideration the police report and the evidence of friends of his brother that could prove the good relations between his brother and the deceased, and that the public prosecutor hid documents that proved his brother's ignorance of the last will of the deceased in his favour.

3.5 Referring to article 14, subparagraph 3 (e), the author claims that there was one Nabil Tadruss who, in the course of the previous investigations, gave evidence that the defendant was together with him at home at the time of the incident, but that the public prosecutor hid the relevant documents. According to the author, his brother was not allowed to summon this witness in court.

3.6 The author further claims a violation of article 14, subparagraph 3 (f), because the Palestinian interpreter of the Court did not translate correctly the words of his brother; he does not, however, specify his complaint, nor does he give examples of incorrect translation.

3.7 It is stated that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

State party's observations and the author's comments

4.1 By submission of 23 May 1996, the State party recalls the facts of the arrest and trial. It is submitted that Mr. Darwish's ex-wife was murdered on 29 January 1992, at about 6 a.m., by several heavy fist blows at her head, strangling and 21 stabs with a kitchen knife. Her body was found the following day. On 30 January 1992, Mr. Darwish was taken into custody at 7 p.m. while being in the Graz Accident Hospital, where he had been admitted on 29 January 1992, at 9.40 a.m., because of injuries which he claimed to have sustained in a traffic accident earlier that morning. He was transferred to the detention centre of the Regional Criminal Court of Graz on 1 February 1992 at 6.30 p.m.

4.2 On 12 November 1992, the Regional Criminal Court of Graz found him guilty of intentionally killing his ex-wife and of slandering her first husband in the course of the preliminary investigations by falsely charging him. His appeal was dismissed on 6 May 1993 by the Supreme Court.

4.3 The State party argues that the author has not shown that he is entitled to present a complaint on his brother's behalf to the Committee. The State party states that there is nothing to prevent the alleged victim himself from submitting a communication under the Optional Protocol. According to the State party, the communication is thus inadmissible.

4.4 The State party further notes that the author has had correspondence with the secretary of the European Commission of Human Rights. It recalls its reservation under article 5, subparagraph 2 (a), of the Optional Protocol, that the Committee shall not consider any communication from an individual when the same matter has already been examined by the European Commission. According to the State party, the Committee is thus precluded from examining the present communication.

4.5 As regards the claim that the author's brother did not receive medical treatment for his broken hand, the State party argues that this claim constitutes an abuse of the right of submission. It recalls that he received medical treatment in the Graz Accident Hospital and that whenever necessary he received medical attention. The State party mentions as example that he was taken to the hospital on 31 January 1992 when he complained about pain in his hand during the interrogation. He also underwent routine medical examinations and a forensic specialist examined him as well and found that the fracture could not have been caused in the manner explained by Mr. Darwish. Furthermore, the State party submits that domestic remedies have not been exhausted, since he did not avail himself of the remedies under sections 120 to 122 of the Execution of Criminal Sentences Code, which are also applicable to remand prisoners.

4.6 The State party also rejects the claim under article 14, subparagraph 3 (a), of the Covenant as an abuse of the right of submission. The State party submits that the record of Mr. Darwish's first interrogation, on 30 January 1992, at 10.35 p.m., shows that he was informed of the reasons for his arrest. Further, on 31 January 1992, he was informed that he could arrange for a person of his trust, a lawyer or the Consulate of his country to be informed of his arrest. The State party provides a copy of the form signed by the author's brother, in which he names two individuals and a lawyer he wishes to be informed, but in which he leaves out the Egyptian Consulate.

4.7 The State party further argues that the claim that there were no sufficient reasons to keep the author's brother in custody, as well as the claim that the presumption of innocence was violated, lacks all foundation. In this context, the State party notes that the author's brother was unanimously found guilty by an eight member jury.

4.8 As regards the claim that the alibi witness for the defence was not allowed to testify, the State party points out that the trial transcript shows that this witness was examined at length, but at no time gave him an alibi. The State party adds that during the first confrontation with this witness, the author's brother asked him in Arabic to give him a false alibi, which the witness refused to do. The Court's interpreter informed the Court about this incident. In the circumstances, the State party argues that this claim constitutes an abuse of the right of submission.

4.9 The State party rejects the author's claim that the interpreter did not translate correctly. According to the State party, the complaint against the interpreter was inspired by his informing the Court of the incident with the witness. The interpreter was then replaced by another one, and neither the accused nor his lawyer ever challenged the interpretation.

5.1 By letter of 5 July 1996, the author submits that it is clear that his brother's little finger is deformed and that this was caused by the negligence of the Austrian authorities. He also recalls that his brother was given medication which affected his memory and indicates that more than once his brother was kept in a cell without lights and that he was sick.

5.2 The author maintains that there was no evidence to base his brother's conviction on. He recalls that there were no traces of blood on his brother's clothes, nor were there fingerprints on the knife. The author also maintains that the general solicitor hid the documents in which the alibi witness had testified that his brother had been with him at the time of the murder.

5.3 The author states that his brother had a right to correct interpretation and that persons attending the trial tried to tell the judge that the interpreter was translating incorrectly.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party submits that the author has entered into correspondence with the Secretariat of the European Commission on Human Rights and recalls its reservation under article 5, subparagraph 2 (a), of the Optional Protocol. The Committee has ascertained, however, that the author's complaint is not being nor has been formally examined by the European Commission. The communication is thus inadmissible on this ground.

6.3 As regards the author's claim that his brother did not receive medical attention, the Committee considers that if this were the case, there is no indication that he complained to the prison authorities or made use of the procedure laid down in sections 120 to 122 of the Execution of Criminal Sentences Code. This part of the communication is thus inadmissible for non-exhaustion of domestic remedies, under article 5, subparagraph 2 (b), of the Optional Protocol.

6.4 Part of the author's claim under article 14 of the Covenant relates to the evaluation of facts and evidence by the judge and jury. The Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate Courts of States parties, to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.5 The Committee considers that the author's remaining claims have not been substantiated, for purposes of admissibility, and they are thus inadmissible under article 2 of the Optional Protocol.

6.6 The State party has submitted that the author is not authorized to present the communication on behalf of his brother since the latter could himself have brought his claim before the Committee. Since the communication is inadmissible on other grounds, the Committee is of the opinion that it need not examine the State party's assertion.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the State party and to the author.

N. Communication No. 698/1996; Gonzalo Bonelo Sánchez v. Spain (Decision of 29 July 1997, sixtieth session)[*]

Submitted by: Gonzalo Bonelo Sánchez [represented by counsel, Mr. José Luis Mazón Costa]

Victim: The author

State party: Spain

Date of communication: 21 September 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 21 September 1995, is Gonzalo Bonelo Sánchez, a Spanish citizen living in Seville, Spain. He claims to be a victim of violations by Spain of article 14, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

Facts as submitted by the author

2.1 On 29 August 1984, the author, a fully qualified pharmacist, requested an authorization to open a pharmacy from the Association of Pharmacists in Cádiz (*Colegio Oficial de Farmacéuticos de Cádiz*). He sought to open a pharmacy in a suburb of San Roque, Cádiz and based his request on the requirements of Royal Decree 909/78 (*Real Decreto* 909/1978). His request was denied by the decision of 10 October 1985, on the ground that the new pharmacy was not sufficiently far from the town nucleus to be separated by a natural or artificial barrier. The author filed an appeal with the Spanish General Council of Official Colleges of Pharmacists (*Consejo General de Colegios Oficiales de Farmacéuticos*), which was also dismissed, on 14 May 1986.

2.2 The author then filed an administrative complaint (*recurso contencioso administrativo*) with the Territorial Court (*Audiencia Territorial*) in Seville. On 20 January 1989, the General Council's administrative decision of 14 May 1986 was reversed, on the ground that the requirement of the separation was illegal as it was derived from a 1979 Ministerial Order (*Orden Ministerial*), which could not supersede a Royal Decree; the author was authorized to open his pharmacy.

2.3 The Spanish General Council of Official Colleges of Pharmacists (*Consejo General de Colegios Oficiales de Farmacéuticos*) in turn filed an appeal with the

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Maxwell Yalden.

Supreme Court of Spain (Tribunal Supremo). On 25 March 1991, the decision of the Territorial Court (Audiencia Territorial) was quashed and the author was denied the disputed authorization. In its judgment, the Supreme Court accepted that Royal Decree 909/78 only required that the new pharmacy give service to a population of over 2,000 people, whereas the Ministerial Order required, additionally, that the new nucleus of population be separated from the existing township by a natural or physical barrier. The Court held that a Ministerial Order could not supersede a Royal Decree, as this would breach the principle of hierarchy; but it went on to argue that the requirement of separation had not been complied with fully in the author's case.

2.4 On 8 July 1994, a Special Chamber of the Supreme Court (Sala Especial del Tribunal Supremo) dismissed the author's further appeal (recurso de revisión). The author's subsequent appeal (recurso de amparo) before the Constitutional Court was declared inadmissible on 13 February 1995.

Complaint

3.1 The author claims that the Supreme Court's judgement of 25 March 1991 was arbitrary and denied him the right to equality before the courts, in violation of article 14, paragraph 1. In this respect, his lawyer contends that the Supreme Court has traditionally ruled in favour of the opening of pharmacies, and encloses copies of two judgements to this effect[36]. However, counsel himself states that the Supreme Court judgement declared that the jurisprudence invoked did not correspond with the facts of the author's case.

3.2 Counsel claims a further violation of article 14, paragraph 1, in respect of the denial of the author's appeal (recurso de amparo). In this respect, he alleges that the judges on the Constitutional Court do not themselves decide the question of inadmissibility, but that decisions are routinely prepared by a team of lawyers (cuerpo de letrados) who work for the Constitutional Court, and that the judges simply sign the decisions. Finally, counsel claims that the author was denied a fair hearing by the Constitutional Court when it dismissed his request for amparo, as only the Public Prosecutor's Office (Ministerio Fiscal) was given the possibility to appeal.

3.3 The author claims that as the result of unjust and partial judicial decisions, together with the application of legislation which he claims to be a relic of medieval times, only applied to pharmacists in the exercise of their profession as dispensers of medicinal goods, he has been subjected to discrimination, in violation of article 26 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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[36] Judgements of the Third Chamber of the Supreme Court of 19 September 1983 and 28 February 1986, which interpret Royal Decree 909/1978 in an extensive manner, i.e in favour of the principle "pro aperture".

4.2 The Committee has carefully examined the material submitted by the author and refers to its established jurisprudence[37] that interpretation of domestic legislation is essentially a matter for the courts and authorities of the State party concerned. In the present case, the author has not substantiated his claim that the law was interpreted and applied arbitrarily or that its application amounted to a denial of justice which could constitute a discrimination in violation of article 26 of the Covenant. The Committee considers that the communication is inadmissible under article 2 of the Optional Protocol.

4.3 With regard to the author's claim of a violation of article 14, paragraph 1, of the Covenant in respect of the dismissal of his appeal by the Constitutional Court, the Committee has carefully examined the material submitted by the author. It considers that the author's counsel does not substantiate, for purposes of admissibility, how the fact that the Office of the Public Prosecutor (Ministerio Fiscal), in defence of the general interest of the public, may appeal against the rejection of a recurso de amparo or how the way in which the Constitutional Court organizes its agenda and conducts its hearings would constitute a violation of the author's right to a fair hearing within the meaning of article 14, paragraph 1, of the Covenant.

5. The Committee therefore decides that:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the author and his counsel and, for information, to the State party.

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[37] See, inter alia, the Committee's decision in Communication No. 58/1979 (Anna Maroufidou v. Sweden, para. 10.1; Views adopted on 9 April 1981).

O. Communication No. 700/1996; Trevor L. Jarman v. Australia (Decision of 8 November 1996, fifty-eighth session)

Submitted by:	Trevor L. Jarman
Victim:	The author
State party:	Australia
Date of communication:	31 August 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 November 1996,

Adopts the following:

Decision on admissibility

1. The author of the communication is Trevor L. Jarman, an Australian citizen, currently residing in Shepparton, Australia. He claims to be the victim of violations by Australia of articles 14, 16 and 26, of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 On 29 June 1984, the author sold his insurance business to Nemur Varity Pty Ltd., the contract was to be executed over a period of 10 years, until 30 June 1994. The author was to remain as manager for a period of at least three years. He claims that Marshall Richards and Associates, a law firm which had done work for his business, judicially claimed from him two invoices in 1994 dating back to 1981 and 1984 respectively, which according to him were statute barred.[38] It appears that the author defended himself.

2.2 The author submits that he did not have a fair and public hearing by a competent and independent court, as the magistrate was a friend of the firm of solicitors against whom he was litigating, and for this reason the members of the Court allowed the plaintiff to submit a barred recovery claim. He was condemned to pay the debt and given 21 days to appeal. He failed to do so in time, filing his appeal 3 months late. The judge refused to accept the appeal after its expiration date, as the author had not shown that there were exceptional circumstances. The author further submits that he was denied legal aid by the legal aid commission of Victoria. It is argued that the Court had insufficient jurisdiction, and that the judgement was unlawful and contrary to law.

Complaint

3. The author claims that the above constitutes a violation of articles 14, 16 and 26 of the Covenant. He claims to have been discriminated against by the judicial system because he is a layman. He further claims that his right to be recognized as a person before the law and his right to equal treatment were violated as he was not permitted to submit his appeal three months after it

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[38] The Statute of limitations for debts in Victoria, Australia is six years.

expired and the plaintiff was permitted to recover a debt which was over 12 years old.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee has carefully examined the material submitted by the author and considers that with regard to his claim of an unfair trial, the information before it does not substantiate, for purposes of admissibility, how the alleged irregularities in his hearings would constitute a violation of his right to a fair hearing under article 14.

4.3 Furthermore the Committee considers that the author's allegations of discrimination and non-recognition of his rights as a person before the law have not been substantiated for the purposes of admissibility: the allegations do not in any way reveal how the author's rights under articles 16 and 26 of the Covenant might have been violated. Therefore, the Committee concludes that the author has failed to advance a claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 2 of the Optional Protocol;

(b) This decision shall be communicated to the author and, for information, to the State party.

P. Communication No. 755/1997; Clarence T. Maloney v. Germany (Decision of 29 July 1997, sixtieth session)[*]

Submitted by:	Clarence T. Maloney
Victims:	The author and his three children, Benedikt, Malika and Konstantin
State party:	Germany
Date of communication:	15 March 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1997,

Adopts the following:

Decision on admissibility[**]

1. The author of the communication is Clarence T. Maloney, an American citizen, born on 23 August 1934, living in India. He claims to be a victim of a violation of articles 17, 23 and 24 of the Covenant on Civil and Political Rights. He also submits the communication on behalf of his three children, Benedikt (born 27 June 1981), Malika (born 15 February 1982) and Konstantin (born on 22 September 1987). The Optional Protocol entered into force for Germany on 25 November 1993.[39]

Facts as submitted

2.1 The author married Barbara Sabass, a German citizen, in 1981. After having lived in Bangladesh for several years, they moved to Germany. In March 1989, the author's wife filed for divorce. The Family Court in Miesbach provisionally granted her the separation, temporary custody, alimony and child support. The author, who was out of the country at the time, states that the Court never contacted him before taking its decision.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Maxwell Yalden.

[**] Pursuant to rule 85 of the Committee's rules of procedure, Mr. Eckart Klein did not participate in the examination of the case.

[39] When acceding to the Optional Protocol, the Federal Republic of Germany entered a reservation to the effect that

> "the competence of the Committee shall not apply to communications [...] by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Republic of Germany, [...]".

2.2 The author tried to obtain full or joint custody, but was informed that under German law joint custody is only possible when both parents agree. The author, who had not seen his children since Christmas 1988, requested visiting rights by application of 8 December 1989. By decision of 18 December 1989, the Miesbach Court denied the author visiting rights. It appears from the text of the judgement that criminal charges were pending against the author for having sexually abused his children Benedikt and Malika.

2.3 It appears from the documents in the case that, on 3 January 1990, the author was convicted for sexual abuse of his children Benedikt and Malika, as well as for failing to pay child support, and sentenced to a suspended sentence of eighteen months' imprisonment, with the probation period set at three years.[40] On 10 February 1995, after the author had been arrested in January 1995 when entering Germany, the Court ordered him again to pay child support (which he apparently had failed to do since 27 January 1993) and prolonged the probation period to six years, until 27 April 1996. The author in his communication repeatedly states that he is not going to contribute child support when he is not allowed to see his children.

2.4 On 6 July 1994, after a procedure that took five years and three months, the Miesbach Court pronounced the divorce, and granted full custody to the mother of the children. The author was refused visiting rights. On appeal, the High Court (Oberlandesgericht) in Munich, by decision of 17 May 1995,[41] confirmed the denial of visiting rights to the author. With this, the author submits, domestic remedies have been exhausted.

Complaint

3.1 The author claims that the complete denial of visiting rights, including the denial of the right to see his children in company of a third person, is in violation of article 23 of the Covenant. He also claims that the Family Court deliberately prolonged the proceedings to prevent him from appealing and from entering the country.

3.2 The author further claims a violation of article 17 of the Covenant, because of the groundless accusations that his ex-wife makes against him, that he is a sexual pervert and that he will abduct the children. In this context, he states that his ex-wife has been in psychotherapy for years, and that she has lost contact with most of her family and friends because of her character. According to the author, his ex-wife has influenced the children against him, using the technique of intensive suggestive questioning so that the children now believe and say that they have been sexually abused. In this context, the author refers to an expert opinion that there is no evidence that his daughter Malika was sexually abused.

3.3 The author also states that he has not been able to have contact with his children by mail or telephone, since their address has been withheld from him. When he found out an address in November 1995, his letters were intercepted. According to a letter written by the author's ex-wife to the High Court, complaining that the author tried to contact the children, the High Court has ruled that the father abstain from such contact. This is also said to be in violation of article 17 of the Covenant.

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[40] A copy of the judgement of the Criminal Court is not provided by the author. The Miesbach Family Court, in its decision of July 1994, refers to the Criminal Court's judgement as a ground for refusing the author visiting rights.

[41] Copy of judgement is not provided.

3.4 The author also claims a violation of article 24 of the Covenant, on behalf of his children, since Germany has failed to offer them protection and has supported the delusions of their mother against their father. In this context, he refers to indications that his son Benedikt has suicidal tendencies. He also complains that the children are now using the last name of their mother, although their lawful name is still Maloney, and that they have not been able to have contact with their half brothers and sisters in America or India. This is said to be a violation of article 24, as the State party failed to preserve the children's identity (surname) and culture (American and Indian background).

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The author claims violations of the Covenant because his ex-wife has made accusations of sexual perverseness against him and because he has been denied contact with his children. The Committee recalls that it is for the Courts of States parties and not for the Committee to evaluate facts and evidence of a particular case, unless it can be ascertained that the Court's decision was clearly arbitrary or amounted to a denial of justice. The Committee notes that the Court decisions in the case show that the author was denied contact with his children on the ground of his conviction for sexual abuse of two of his children. In the circumstances, the Committee finds that the author has failed to substantiate, for purposes of admissibility, that the facts as presented by him constitute a violation of articles 17 and 23 of the Covenant. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

4.3 As regards the author's claims on behalf of his children, the Committee notes that he has failed to take any steps to bring these claims before the Court which, it appears from the file, continues to have jurisdiction over them. This part of the communication is thus inadmissible for failure of exhaustion of domestic remedies, under article 5, subparagraph 2 (b), of the Optional Protocol.

5. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible;

(b) This decision shall be communicated to the author and, for information, to the State party.

Q. Communication No. 758/1997; José M. Gómez Navarro v. Spain (Decision of 29 July 1997, sixtieth session)*

Submitted by: José María Gómez Navarro [represented by Mr. J. L. Mazón Costa]

Victim: The author

State party: Spain

Date of communication: 19 September 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is José María Gómez Navarro, a Spanish citizen living in Cartagena, Spain. He claims to be a victim of violations by Spain of article 14, paragraph 1, article 25, subparagraph (c), and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Spain on 25 April 1985. The author is represented by counsel, Mr. José Luis Mazón Costa.

Facts as submitted by the author

2.1 The author, who has been a civil servant for 23 years in the Administrative Service (*Cuerpo Administrativo*), holds a law degree and has held posts of certain responsibility. He complains that he has not been promoted; on 13 September 1991 he requested a promotion, which was denied him, by decision of the Ministry of Public Affairs (*Ministerio para las Administraciones Públicas*), on 5 November 1991, on the ground that he had failed one of three competitive exams.

2.2 The author complains that in the promotion policy for Spanish civil servants, neither merits nor professional ability are taken into account. He contends that those are two criteria which should be observed by the authorities when promoting civil servants, and claims that this is a requirement imposed by the 1978 Spanish Constitution (article 23, para. 2).

2.3 The author claims that he suffered discriminatory treatment in 1976, when the Government enacted a Decree (*Decreto-Ley 14/1976*) which created the Treasury Service Section (*Cuerpo de Gestión de la Administración del Estado*). By this, all administrative service civil servants who were then serving in the Treasury (*Ministerio de Hacienda*) were automatically integrated into the newly created Treasury Service Section. As a result, the author and those colleagues who at that time were not working in the Treasury, were not integrated into the new department. The author claims that the 1976 Decree had disastrous consequences for his career.

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* The following members of the Committee participated in the examination of the communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Maxwell Yalden.

2.4 In 1984, the Public Service Amendment Act No. 30/1984 (Ley 30/1984 de Reforma de la Función Pública) was enacted. This Act was the legal basis for the promotion of a wide range of civil servants. The implementary regulations introduced by the Amendment Act established different criteria which governed the promotion of various categories of civil servants.

2.5 The author alleges that he was unjustly discriminated against, as other civil servants were promoted without sitting competitive examinations, while he had to sit three different examinations. He also claims that while some civil servants were promoted without having to prove that they had a college degree, others, like himself, were required to provide proof of college education.

2.6 After the denial of his promotion in 1991 the author filed an administrative complaint (recurso contencioso administrativo) with the High Court (Audiencia Nacional) in Madrid. On 5 December 1994, the High Court (Audiencia Nacional) upheld the decision of the Ministry of Public Affairs; the Court was of the opinion that the Ministry of Public Affairs decision was in total conformity with law. On 13 March 1995, the author's further appeal (recurso de amparo) to the Constitutional Court was declared inadmissible.

Complaint

3.1 Counsel contends that the facts as described above constitute a violation of articles 25, subparagraph (c) and 26 of the Covenant.

3.2 The author notes that he passed the first two parts of the competitive examination but failed the third, which in his opinion was unnecessary. He claims that he was discriminated against because in the following year, the third phase of this examination was abolished. To him, this situation constitutes a violation of his right to have access, on general terms of equality, to public service in his country, as provided for in article 25, subparagraph (c) of the International Covenant on Civil and Political Rights.

3.3 Counsel further claims a violation of article 14, paragraph 1, in respect of the denial of his client's appeal (recurso de amparo) by the Constitutional Court. In this respect, he alleges that the judges on the Constitutional Court do not themselves decide the question of inadmissibility, but that decisions are routinely prepared by a team of lawyers (cuerpo de letrados) who work for the Constitutional Court, and that the judges simply sign the decisions. Counsel claims that the lack of clear language in the Constitutional Court's decision, also implies a violation of article 14, paragraph 1. Finally, counsel claims that the author was denied a fair hearing by the Constitutional Court when it dismissed his request for amparo, as only the Public Prosecutor's Office (Ministerio Fiscal) is given the possibility to appeal (recurso de suplica).

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee considers that the author's allegations of discrimination and denial of his right to access, on general terms of equality, to public service in his country have not been substantiated for the purposes of admissibility: the allegations before the Committee do not disclose the link between these and how the author's rights under articles 25 (c) and 26 of the Covenant might have been violated. In this respect, therefore, the Committee concludes that the author has failed to advance a claim within the meaning of article 2 of the Optional Protocol.

4.3 With regard to the author's claim of a violation of article 14, paragraph 1, of the Covenant in respect of the dismissal of his appeal by the Constitutional Court, the Committee has carefully examined the material submitted by the author. It considers that the author's counsel does not substantiate, for purposes of admissibility, how the fact that the Office of the Public Prosecutor (*Ministerio Fiscal*), in defence of the general interest of the public, may appeal against the rejection of a *recurso de amparo* or how the way in which the Constitutional Court organizes its agenda and conducts its hearings would constitute a violation of the author's right to a fair hearing within the meaning of article 14, paragraph 1, of the Covenant.

5. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 2 of the Optional Protocol;

(b) This decision shall be communicated to the author, his counsel and, for information, to the State party.

R. Communication No. 761/1997; Ranjit Singh v. Canada (Decision of 29 July 1997, sixtieth session)[*]

Submitted by: Ranjit Singh

Victim: The author

State party: Canada

Date of communication: 20 January 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1997,

Adopts the following:

Decision on admissibility[**]

1. The author of the communication is Ranjit Singh, a Canadian citizen residing in Edmonton, Alberta, Canada. In his submission, the author claims to be victim of a violation of articles 7, 14, paragraph 2 and subparagraph 3 (a), and articles 17 and 26 of the Covenant.

Facts as submitted by the author

2.1 On 29 April 1986, the author was dismissed from a graduate training course in Communicative Disorders at the University of Western Ontario, after having spent two years in this programme. The grounds for dismissal invoked by the Department of Communicative Disorders were communicated to the author during a meeting with the Department Graduate Committee on 29 April 1986: they relate to repeated occurrences of hostile, abusive and threatening behaviour on the part of the author vis-à-vis various individuals working with the Department, as well as the insufficient clinical grades the author had received for his studies (69 per cent), when 70 per cent is the passing grade for clinical practicum courses in the Department[42]. However, the author claims that the real grounds for his dismissal relate to an incident which happened on 27 April 1986, when the office of an instructor in the training course was deliberately set on fire as he was sleeping in it, after his house had been gutted by fire a month earlier. According to the author, he was suspected by staff from the Department to be responsible for the incident, although he was never formally charged with a criminal offence.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar and Mr. Martin Scheinin.

[**] Pursuant to rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

[42] The letter from the Department Graduate Committee, together with the minutes of the meeting between the author and the Committee, are reprinted in a book entitled Breach of Trust, published by the author and attached to the communication.

2.2 On 7 May 1986, the author submitted a file setting out the details of his case to the Dean of the Faculty of Graduate Studies, and asked for an appeal hearing against the decision of the Department Graduate Committee. The Department of Communicative Disorders was requested to set out its position; in the latter's submission to the Dean of the Faculty of Graduate Studies, three major factors were considered by the Department before the decision to dismiss the author from the programme, namely (a) his failing grade for the clinical practicum; (b) his highly defensive and confrontational attitude towards faculty members; and (c) his hostile, abusive and aggressive behaviour towards some members of the faculty, which on two occasions included statements that were taken as threats to the safety and physical integrity of Department staff, their families and possessions.

2.3 The author and members of the Department of Communicative Disorders were heard by an ad hoc Committee on 18 and 24 June 1986. Two days later, the author received a letter from the Dean of the Faculty of Graduate Studies, notifying him that the Committee had unanimously rejected his petition for reinstatement, on the grounds that the author's academic performance had been borderline in 1984-85 (71.8 per cent); that difficulties had emerged when supervisors attempted to provide feedback and corrections of his activities; and that the author failed to achieve a passing grade in his Oral Rehabilitation programme. The author, arguing that in this decision, the grounds for his expulsion from the programme had been fabricated as purely academic by the ad hoc Committee, petitioned the Senate Review Board Academic, which held a hearing on 3 October 1986. The author's petition was denied by the Review Board, thus concluding the appeal hearings within the University appeal process.

2.4 On 11 January 1989, the author, through counsel, filed a statement of claim against the University and 14 individual defendants with the Supreme Court of Ontario, which dismissed the author's claims on 19 August 1992, on the grounds that the court was not satisfied that the defendants acted with malice toward the plaintiff, and thus that the decision reached by the Faculty was based on injurious falsehoods. Nevertheless, the Court, taking into account medical reports stating that the author's current condition resulted from his forced withdrawal from the audiology training programme, assessed non-pecuniary general damages to the author at 40,000 Canadian dollars, but condemned the plaintiff to pay the costs to the defendants, for an amount of 28,184 Canadian dollars. The author appealed this decision to the Court of Appeal for Ontario, which dismissed the appeal on 18 October 1993, on the grounds that the University followed its proper procedures and applied its usual standards; and that the trial judge had found, on the evidence before him, that there was sufficient factual foundation to justify the University's decision. The Supreme Court of Canada dismissed the author's application for Leave to Appeal on 5 May 1994.

2.5 On 6 May 1996, the author applied to the Court of Queen's Bench of Alberta to set aside the registration of legal costs ordered against him by the Supreme Court of Ontario, which denied the application on the grounds that Alberta courts must give full faith and credit to the decision taken by the Ontario Court of Appeal, which properly evaluated all the evidence in the case.

Complaint

3.1 The author claims to be a victim of a violation of his human rights by the Canadian judiciary and the University of Western Ontario, and invokes article 7, article 14, paragraph 2 and subparagraph 3 (a) and articles 17 and 26 of the Covenant.

3.2 The author alleges that, being suspected by the University of Western Ontario of having committed a serious criminal offence, he was expelled from the University, with lasting consequences for his professional and private life, in violation of article 14, paragraph 2, of the Covenant. He claims that, since he was never formally charged with any criminal offence, he was denied the opportunity to defend himself from the University's suspicions, in breach of article 14, subparagraph 3 (a), of the Covenant.

3.3 By reference to a letter dated 14 May 1986 from an employee of the University, which retraces the author's alleged history of violence, including stabbing and his being characterized as a dangerous psychopath by a member of the University of Alberta where he was a former student, and which was admitted as evidence in the Canadian courts, the author contends that these false statements greatly injured him in his character, credit, reputation in the community, in violation of article 17 of the Covenant. They are said to have caused a loss of status and loss of employment opportunities.

3.4 The author claims that a confusion in some of the University members' minds between another man named Singh involved in the bombing of a transatlantic flight, and his being regularly considered as a Sikh, were the reasons for his being investigated and regarded as the perpetrator of serious criminal offences. According to the author, his ethnic origin was thus a principal reason for the treatment he received, contrary to article 26 of the Covenant.

3.5 Finally, the author claims that the State party's failure to provide social security to himself and his dependent children, while he is unable to sustain his family as a consequence of his forced withdrawal from the University, constitutes inhuman and degrading treatment, in violation of article 7 of the Covenant.

Admissibility considerations

4.1 Before considering any claims contained in a communication the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the majority of the author's claims relate to the evaluation of facts and evidence in his case by the authorities of the University of Western Ontario and the Canadian courts, which were seized of the author's grievances. It recalls that it is primarily for the courts of States parties to the Covenant and the appellate instances of States parties to the Covenant to evaluate the facts and evidence in any particular case. It is not for the Committee to review such evaluation of facts and evidence by the domestic tribunals, unless it can be ascertained that the domestic judges manifestly violated their obligation of impartiality or otherwise acted arbitrarily, or that the courts' verdict(s) amounted to a denial of justice. On the basis of the material before the Committee, there is no indication that the State party's tribunals seized of the case acted in any way that would have been contrary to article 14. Both the Supreme Court of Ontario and the Court of Appeal for Ontario, as well as the Court of Queen's Bench of Alberta, heard the author's grievances in some detail and dismissed them as without merits, giving reasoned decisions. The fact that these decisions went against the author and that the author continues to express dissatisfaction with them does not, per se, raise an issue under the Covenant. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant.

4.3 The author has claimed that the decisions against him taken by the University of Western Ontario and the Canadian judiciary amount to violations of articles 7 and 14, paragraph 2 and subparagraph 3 (a) and articles 17 and 26 of the Covenant. The Committee considers that on the basis of the material submitted by the author, no issues under these provisions arise in the instant case. Firstly, there is no evidence in any of the impugned decisions, whether they are by university authorities or Canadian tribunals, that the author was treated differently from other Canadian citizens on account of his ethnic origin. Secondly, the Committee considers that the non-provision of social security services to the author or to his family after his withdrawal from the University of Western Ontario raises no issues under article 7. Thirdly, since the author was never implicated with any criminal offense, there can be no question of a violation of the presumption of innocence and of the guarantees of the defence protected by article 14, paragraph 3. Finally, the Committee observes that the conduct of judicial proceedings in accordance with the requirements of article 14 does not raise issues under article 17 of the Covenant. Accordingly, in respect of all of the above allegations, the author has failed to advance a claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible;

(b) This decision be communicated to the author and, for information, to the State party.